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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

THE TEXAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

BRIEF OF APPELLEE.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

BRIEF OF APPELLEE.

Statement of the Case.

The opinion of the district court is reported in 13 Federal Supplement, page 242.

(1) *Pleadings and Decree.*

This suit was a bill in equity which was filed on September 24, 1935, by The Texas Company, a Delaware corporation qualified to transact business in Alabama, in the United States District Court for the Middle District of Alabama,

at Montgomery, Alabama, against certain officials of the State of Alabama, all of whom are residents of Alabama and charged with the duty of administering and enforcing the gasoline excise tax statutes of that State.

The plaintiff claimed that the defendants were seeking to collect from it excise taxes based on or measured by the gasoline sold by it or withdrawn from storage by it in Alabama for sale and delivery to the United States, that the State statutes under which the officials were purporting to act were unconstitutional and void in so far as they imposed taxes on account of such gasoline so sold and delivered, and that the plaintiff had no adequate remedy at law for the protection of its constitutional rights (R. 1-21).

The defendants filed a motion to dismiss and also an answer in which the defendants asserted their right to collect the taxes with respect to the gasoline sold by plaintiff or withdrawn from storage by plaintiff for sale to the United States. Defendants also denied that the plaintiff did not have an adequate remedy at law (R. 70-73, 77-91).

Both an interlocutory and a permanent injunction were prayed for in the bill (R. 21) and a statutory three judge court, consisting of Circuit Judge Hutcheson and District Judges Ervin, and Kennamer, was convened as provided by Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380) (R. 73). Upon the hearing of the prayer for an interlocutory injunction, it was agreed by all parties that, without plaintiff waiving its insistence on its application for an interlocutory injunction, this case might also be submitted for final decree upon the same testimony (R. 94).

The case was submitted upon an agreed statement of facts, together with a few additional affidavits (R. 94, 95).

At the hearing, the United States was granted permission to file and did file a brief as *amicus curiae* in opposition to the contention of the State that the plaintiff was liable for the excise taxes on account of the gasoline sold

or withdrawn from storage by it in Alabama for sale to the United States.

The District Court entered a decree on December 7, 1935 (Circuit Judge Hutcheson dissenting) restraining the defendants from collecting from plaintiff any taxes imposed by the gasoline excise tax statutes with respect to any gasoline sold or withdrawn from storage for sale to the United States in Alabama (R. 224, 225).

The District Court found the facts to be as stipulated by the parties and that more than Three Thousand Dollars ($3,000.00) was involved in the suit (R. 222).

The conclusions of law were:

(1) That under the Alabama statutes where gasoline was sold, the tax was measured by the amount of the sales and that the statutes were therefore unconstitutional and void, because contrary to the Constitution of the United States in so far as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

(2) That even should the statutes be treated as imposing a privilege tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States, the necessary effect would be the same as if the tax were measured by the quantity sold, as in both instances the price to the Government for such commodity would be increased by the amount of the tax and the tax burden in each case would necessarily and directly fall on the United States.

(3) That the plaintiff had no adequate remedy at law, because if it paid the taxes as they monthly matured, it would be under the necessity of instituting a multiplicity of suits to recover the payments. Failure to pay the taxes

subjected the taxpayer to a penalty of twenty-five per cent of the amount thereof, and a lien for the taxes and penalty attaches to the property of the taxpayer located in the State.

(4) That as final decree was being entered granting a permanent injunction, it was unnecessary for the Court to act separately on plaintiff's application for an interlocutory injunction (R. 222-223).

A written opinion by Judge Ervin, concurred in by Judge Kennamer, was also handed down, in which the Court amplified the facts stated in its conclusions of law as to the proper construction of the Alabama statutes and other applicable legal principles involved in the case (R. 226-233). Circuit Judge Hutcheson filed a dissenting opinion (R. 233-239.)

The defendants perfected a direct appeal to this Court as authorized by Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380).

(2) *Statement of the Facts.*

We summarize the facts as agreed upon by the parties, the plaintiff being referred to as "Company."

Company and its immediate predecessor in title and interest has been carrying on business in Alabama for more than fifteen years. It has a large investment in equipment and other property in the State and does business in every county (R. 110). The principal commodity sold by it in Alabama is gasoline, all of which is refined by it at Port Arthur, Texas, and then transported by barges to its terminals located near docks at Mobile, Alabama, Pensacola, Florida, or Millville, Florida. Gasoline from these terminals is not only distributed in Alabama but also in Florida, Georgia, Louisiana and Tennessee (R. 113).

The gasoline which the Company sells and delivers in Alabama to its customers is either delivered from its Mobile terminal or from one or more of its thirty-six bulk plants located in the State, or from retail service stations located therein. The bulk plants are located adjacent to railroad lines and when gasoline is shipped to them from one of the three above mentioned terminals by rail, it is unloaded into the storage tanks or other containers located on the bulk plant premises where it remains until it is withdrawn for delivery to customers who desire bulk plant delivery, or is withdrawn and conveyed to service stations where it is sold at retail to the public (R. 113, 114).

The gasoline which the Company sells in Alabama to the United States is either delivered from its terminal, Mobile, Alabama, or from its bulk plants in Alabama or from retail service stations either owned by it or handling its products. The gasoline which is delivered from the terminal at Mobile is gasoline which has been shipped by barge from Port Arthur, Texas and stored in the terminal where it remains until withdrawn for delivery to the United States, the delivery being in railroad tank cars on railroad tracks adjacent to the terminal (R. 116). The gasoline sold and delivered to the United States in Alabama from bulk stations is gasoline which has been shipped by railroad cars from one of the three terminals above mentioned to the bulk plants and there unloaded and stored until withdrawn for delivery to the Government (R. 117). The gasoline sold to the Government through the retail service stations has been shipped from the said terminals to the bulk plants and then taken from the bulk plants and placed in the service station tanks where it remains until sold and delivered to the United States (R. 117).

There are three kinds of service stations through which the Company makes deliveries to the Government:

(a) Service stations owned and operated by it.

(b) Service stations owned by others to which gasoline is delivered on consignment, the title remaining in the Company until deliveries are made to the Government.

(c) Independently operated stations where the Company sells the gasoline to the owner of the station who in turn makes deliveries to the United States. Deliveries made from this third class of service stations to the United States are for the account of the Company and are made pursuant to previous arrangements which the Company has made with the owners of such service stations and the Company bills the United States and collects the price for such gasoline directly from the United States (R. 114, 115).

Practically all of the gasoline received by the United States from the company is sold and delivered pursuant to previous written contracts between the parties. A number of typical contracts are attached as exhibits to the agreed statement of facts (R. 145, 167, 175, 194, 214). These contracts are negotiated by means of written bids tendered by the oil companies to the Government on forms prepared by the latter and cover, for a period of time, usually from three to nine months, all of the gasoline requirements of certain named departments of the Government in all or certain of the states designated in the contracts during the time stipulated. As to the sales and deliveries made by the Company in Alabama, some contracts specify deliveries at terminal, Mobile (R. 116), some bulk plant delivery (R. 117) and some service station delivery (R. 118). The price charged to the Government varies according to the delivery point, the deliveries at the terminal being the lowest and deliveries through retail service stations being the highest. The contracts heretofore entered into between the company and the United States were executed in the name

of the United States, and contained an agreement that the United States would pay for the gasoline purchased thereunder, and each contained one or both of the following provisions:

> "Bids must be submitted at definite prices per gallon, and shall be exclusive of state or municipal taxes. (See decision of the Supreme Court in the case of the *Panhandle Oil Company* v. *Mississippi*, May 14, 1928)" (R. 154).
>
> "Price to be paid for gasoline does not include state tax" (R. 170).

Invoices for the gasoline furnished under the contracts were required to be forwarded to a designated finance or disbursing officer of the United States who paid the same with Government funds. For example, the gasoline shipped from the terminal at Mobile under contract dated June 21, 1934 to the United States Army, Ft. McClellan, Alabama, was billed to the finance officer at that point and payment was made by him (R. 149).

Where the gasoline was sold through the bulk plants or retail service stations, the Government agent or employee receiving same gave a receipt to the Company and at the end of the month the Company forwarded these receipts to the Government disbursing officer and was paid the amount due for the gasoline so delivered (R. 117, 118, 119).

The United States has prepared a form which is used in all states and which is designated as Form 44—Exemption Certificate (R. 129). These forms are furnished to each Government agent or employee entitled to purchase gasoline for Government purposes (R. 121). In every instance where gasoline is sold in Alabama to the Government, one of these certificates is received from a Government officer, agent, or employee making the purchase or receiving the gasoline, describing the amount so purchased,

and is filed in the Company office where it is retained for inspection by the auditors of the State Tax Commission (R. 120).

The amount of gasoline which the Company had sold and delivered in Alabama to each department or agency of the United States during the approximate five year period preceding the filing of this suit is set out in Exhibit "2" attached to the agreed statement of facts (R. 128).

There were two contracts in effect with the United States for the sale and delivery of gasoline in Alabama to it by the Company at the time of the trial of this suit (R. 194, 214). The United States had requested under date of July 29, 1935 bids on tank car deliveries for Region No. 2 which covered Alabama and nine other States (R. 205); the deliveries to be made during the period from October 1 to December 31, 1935 (R. 202, 205). The Company on August 12, 1935 submitted a bid on a form prepared by the Government (R. 205). On August 13, 1935 the bids were publicly opened (R. 206). On September 27, 1935, the Treasury Department gave formal notice of its acceptance of the bid of the Company (R. 194). This contract called for the following estimated quantities of gasoline to be delivered from the Company terminal at Mobile:

54,325 gallons to Quartermaster United States Army, Ft. McClellan, Alabama.

47,840 gallons to Quartermaster United States Army, Maxwell Field, Alabama.

32,000 gallons to Tennessee Valley Authority, Wilson Dam, Alabama.

The price was seven cents per gallon where deliveries were made F. O. B. Mobile, Alabama, and approximately nine cents per gallon where deliveries were made F. O. B. destination (R. 214).

On September 18, 1935, the Company submitted a bid to the United States Department of Interior covering purchases for that department in Alabama for a period from October 1, 1935 to June 30, 1936 (R. 217). The bids were publicly opened on September 19, 1935 (R. 216). The contract was formally awarded to the Company on October 4, 1935 (R. 214). This contract calls for service station deliveries (R. 221).

(3) *History of the Gasoline Tax Statutes.*

All of the Alabama gasoline excise tax statutes levying taxes computed on a gallonage basis are set out in the record, (R. 3-9, 22-54), except the first act adopted in 1923 which is set out as Exhibit "A" in the Appendix to this brief.

The 1923 Act assessed a tax of two cents per gallon based only on sales. The Legislature of 1927 amended the act so as to impose the tax on every distributor, retail dealer or storer selling, distributing or withdrawing from storage gasoline in the State (R. 3). The Legislature also passed another act in 1927 very similar to the 1923 Act as amended imposing an additional tax of two cents per gallon (R. 22-26). An act similar to the two 1927 acts was adopted in 1931 imposing an additional gallonage tax of one cent (R. 26-31). An act similar to the other acts then in effect was adopted in 1932 imposing another one cent tax. This act added the word "refiner" to the other persons on whom the tax was levied (R. 31-36). In January, 1935, another act was adopted suspending or repealing the two acts last mentioned and imposing a tax of two cents in lieu of the two one cent levies contained in these acts (R. 37-44).

The Legislature adopted a general revenue act approved by the Governor on July 10, 1935, in which practically all of the revenue laws were incorporated as well as new provisions and repeal of prior acts in conflict therewith. All

the previously existing tax levies were repealed and in one portion or article of the new act designated as Schedule 156 a consolidated levy of six cents per gallon was enacted (R. 44-54). Schedule 156 was substantially the same in all respects here pertinent as the previous gasoline tax acts. The new act did purport to levy taxes on every distributor, refiner, retail dealer or storer of gasoline upon the selling, distributing, storing or withdrawing from storage, while the previous acts levied taxes upon the same persons engaged in selling, distributing or withdrawing from storage this commodity.

It will thus be noted that the rate of tax from the inception of the statutes imposing gallonage taxes was as follows:

From 1923 to 1927	2 cents.
From 1927 to 1931	4 cents.
From 1931 to 1932	5 cents.
From 1932 to the present	6 cents.

(4) *Administrative Interpretation of the Gasoline Tax Statutes.*

On March 22, 1923, the Attorney General of Alabama rendered an opinion to Joseph John, Assistant United States Attorney, Mobile, Alabama, holding that the sellers of gasoline in the State could not deduct or fail to pay the tax levied under the 1923 Act on sales made by them to the National Government (R. 91).

On August 22, 1928, the Attorney General of Alabama rendered an opinion to the State Tax Commission concerning the validity of the 1927 Acts as applied to sales to the United States. Both the 1927 Acts were adopted prior to the date of the decision of this Court in *Panhandle Oil Company* v. *Mississippi,* 277 U. S. 218, 72 L. Ed. 857 (May 1928). In this opinion of the Attorney General, it was held that the seller was not liable for any taxes on transactions with the United States imposed under the 1927 Acts (R. 54).

On November 22, 1928, following the decision in the *Panhandle* case, *supra*, the Attorney General of Alabama rendered an opinion to Hon. John G. Sargent, Attorney General of the United States, Washington, stating that on sales of motor fuels to the United States by dealers in Alabama, no tax was exacted and that where such tax had been paid in the past Alabama had no law by which a refund could be made (R. 58).

On July 14, 1933, the Attorney General of Alabama rendered an opinion to the State Forester that where gasoline was bought by the Government and used for governmental purposes, no tax could be collected under the statutes then in effect (R. 127).

On July 5, 1935, the Attorney General of Alabama rendered an opinion to the President of the State Tax Commission that the statutes did not levy a tax based on the sale of gasoline but upon the privilege of storing, which tax accrued upon and at the time of the withdrawal from storage and that whether the withdrawal is made for wholesale or retail trade or other use is immaterial. The conclusion was then reached in the opinion that the dealers in Alabama were liable for the taxes with respect to the gasoline sold and delivered by them in Alabama to the United States (R. 59-69).

From the date of the decision by this Court in the case of *Panhandle Oil Company* v. *Mississippi* (May 14, 1928) until June, 1935, none of the officials or representatives of the State made any claim that the Company was liable to the State for taxes with respect to the gasoline sold or withdrawn from storage by it for sale to the United States (R. 122).

Copies of all forms furnished by the State Tax Commission to the Company from 1930 to the date of trial in this case for the monthly reports of its gasoline transactions in the State are attached as exhibits to the agreed

statement of facts (R. 130-136). On most of the forms the taxpayer was required to list sales and withdrawals separately. The Company showed the amount of sales each month to the United States in separate columns and no tax was assessed with respect thereto. On all the forms in use since January, 1932, under the heading of instructions the following appears:

> "4. No credit will be allowed on sales to U. S. Government unless proof is submitted that such sales were for strictly Governmental Instrumentalities."

It has been the uniform practice since the passage of the Excise Tax Acts in 1927 for the Company and all other oil companies doing business in the State to omit reporting the gasoline sold or intended for sale until the time the title thereto passed from the companies to the purchasers and to omit reporting the gasoline withdrawn from storage for use other than sale until it was actually withdrawn for such other use. The State Tax Commission with knowledge of this practice has never prior to June, 1935, insisted that the transactions be reported in any other manner or the tax paid thereon in any different manner than as shown by such returns (R. 124).

The auditors of the State Tax Commission since prior to January 1, 1930, have audited the books of the Company at intervals of approximately three months and have examined each of the tax exemption certificates (Form 44) covering sales to the Government, but never made any claim prior to June, 1935, that the Company was liable for taxes with respect to the gasoline sold to the United States (R. 123).

From August 2, 1932, until March 11, 1935, the State Tax Commission in answer to inquiries from the Company and also by circulars on many occasions advised the Company that no taxes were due the State on gasoline sold

by it to the United States, but did advise that taxes were payable by independent dealers who bought their requirements in the State and thereafter sold same to the Government (R. 137-144).

The first time since 1928 that the Company was informed that the State intended to claim that it was liable for delinquent taxes on account of the gasoline which had been sold to the United States was when it received a telegram at its Atlanta office on June 17, 1935, from Thomas E. Skinner, Special Agent, State Tax Commission, reading as follows:

> "A thorough audit of your books discloses that you have withdrawn one million three hundred thousand gallons gasoline from Alabama storage on which excise tax has not been paid STOP Demand is hereby made on you for the payment of excise tax on this gasoline computed at the rate prescribed by law plus interest and penalty STOP Make check payable to undersigned and address reply to this office" (R. 12).

After receipt of this telegram the Company received a letter from the State Tax Commission dated July 9, 1935, advising that the Attorney General had rendered an opinion dated July 5, 1935, to the effect that gasoline sold to the United States could not be deducted from the taxable gallons sold or withdrawn from storage in Alabama but must bear the State tax of six cents a gallon, and also calling attention to the fact that as the lubricating oil tax law was worded almost exactly like the gasoline tax acts it was the opinion of the writer that the same ruling would apply to both gasoline and lubricating oil sales (R. 144, 145).

On August 30, 1935, the State Tax Commission wrote another letter to the Company that no deductions in taxes could be allowed from gasoline sales by reason of gallonage sold to the United States or Federal Agencies. The Company was requested to add to its August sales such deductions as it made in its return covering July sales and

to remit the tax along with the tax covering August sales on or before September 20. The Company was also advised that in preparing its returns in the future no allowance could be made by reason of sales to the Federal Government (R. 13, 14).

The Company after this suit was instituted received a letter from the State Tax Commission dated October 10, 1935, referring to the prior letter of August 30, 1935, stating that it had come to the knowledge of the writer that certain inferences or conclusions had been drawn from the previous letter not intended to be conveyed and stating that the Company was required to compute and pay the excise tax on the amount of gasoline stored in the State, measured by the amount withdrawn from storage, that the tax did not apply to shipments in interstate commerce, and that the Commission was not concerned with the use to which the gasoline is put after its withdrawal from storage (R. 85-86).

The defendants admit that they intend to follow the ruling of the Attorney General dated July 5, 1935 and to collect or attempt to collect the taxes with respect to the gasoline withdrawn from storage in Alabama and sold to the United States, unless they are enjoined or restrained from doing so by judicial order or decree (R. 113).

The Company was informed by the State Tax Commission prior to the institution of this suit that if the taxes were not paid on all sales or withdrawals for sale to the Government for a period of the preceding five years, a suit or suits would be instituted for their recovery and that the Company would be subjected to the penalties provided in the Gasoline Excise Tax Acts (R. 112).

The Company has paid all taxes purported to be levied by the gasoline statutes on gasoline handled by it except taxes with respect to withdrawals from storage for sale to the United States or with respect to sales to the United States since the decision in the *Panhandle Oil* case (R. 124).

Summary of the Argument.

I.

The statutory three judge court had jurisdiction. The plaintiff applied for an interlocutory and a permanent decree restraining the enforcement, operation or execution by certain officials of the State of Alabama of the State gasoline tax acts which levy excise taxes with respect to gasoline sold by plaintiff to the United States, on the ground that such statutes are unconstitutional and void because violative of the Federal Constitution. Application for interlocutory injunction was pressed. More than $3,000 is involved in the controversy.

Section 266 of the Judicial Code (U. S. C. A., Title 28, Sec. 380);

Sterling v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375;

Stratton v. *St. Louis Southwestern Railway Company*, 282 U. S. 10, 75 L. Ed. 135.

II.

The Texas Company was the proper party to sue and can maintain this suit, as it was required to report and pay the taxes to the State and liable for penalties in the event of failure to do so.

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857.

Cummings v. *Merchants National Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903;

Hammer v. *Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101;

Pierce v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070;

Buchanan v. *Warley*, 245 U. S. 60, 62 L. Ed. 149;

Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131;

Savage v. *Jones*, 225 U. S. 501, 56 L. Ed. 1182;

Station WBT, Inc., v. *Poulnot*, 46 F. (2d) 671.

III.

The plaintiff did not have an adequate remedy at law.

(a) Payment of the gasoline taxes is required to be made monthly and unless suits for refunds are filed within sixty days from the date of the respective payments, they are barred, thus imposing on the plaintiff, in order to protect its legal rights, the necessity of instituting a multiplicity of suits involving the same issues of law.

Matthews v. *Rogers,* 284 U. S. 521, 76 L. Ed. 447;
Wilson v. *Illinois Southern Railway Company,* 263 U. S. 574, 68 L. Ed. 456;
Lee v. *Bickell,* 292 U. S. 415, 78 L. Ed. 1337;
American Airways v. *Wallace,* 57 F. (2d) 877.

(b) The tax refund statutes of 1927 and 1931 provided no remedy at law for taxpayers to recover taxes illegally collected by the State Tax Commission. The statutes also failed to provide for the payment of interest on the taxes refunded.

Hopkins v. *Southern California Telephone Company,* 275 U. S. 393, 72 L. Ed. 329;
Butler v. *Schulte,* 67 F. (2d) 632 (C. C. A. 5th);
Nutt v. *Ellerbe,* 56 F. (2d) 1058;
Proctor & Gamble Distributing Company v. *Sherman,* 2 F. (2d) 165.

(c) The tax refund statute of 1935 provides that the officials collecting illegal taxes shall not be individually liable therefor. The officials can be sued only in their official capacity. Such a suit is one against the State violative of Section 14 of the Alabama Constitution which provides that the State shall never be made a party defendant in a suit

at law or equity, which constitutional provision cannot be waived by the Legislature of Alabama.

Smith v. *Reeves,* 178 U. S. 436, 44 L. Ed. 1140;
Alabama Girls' Industrial School v. *Reynolds,* 143 Ala. 579, 42 So. 114;
Alabama Industrial School v. *Adler,* 144 Ala. 555, 42 So. 116;
White v. *Alabama Insane Hospital,* 138 Ala. 479, 35 So. 454.

(d) The revenue statute of 1935 restricted the taxpayer's right to sue to the State courts, which is not a sufficient remedy to the taxpayer, and such statute does not oust the jurisdiction of Federal equity courts of suits filed by a non-resident taxpayer where there is more than $3,000 involved.

City Bank Farmers Trust Company v. *Schnader,* 291 U. S. 24, 78 L. Ed. 628;
Southern Railway Company v. *Query,* 21 F. (2d) 333.

(e) The taxes payable to the State under the gasoline tax statutes are secured by a lien on all the property of the taxpayer located in the State superior to liens of all other parties.

Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737.

(f) The taxpayer is subjected to penalties for failure to report and pay the tax as required by the statutes. The tax officials prior to the institution of this suit informed the plaintiff that the State would insist on the payment of such penalties (R. 7, 45, 112, 113).

Western Union Telegraph Company v. *Andrews,* 216 U. S. 165, 54 L. Ed. 430;
Raymond v. *Chicago Union Traction Company,* 207 U. S. 20, 52 L. Ed. 78.

IV.

The plaintiff had the right to maintain the bill for injunction as to both past and future transactions with the United States, as there was no adequate remedy at law by which plaintiff could protect its rights. An equity court has jurisdiction to decide all the issues involved in the controversy.

Western Union Telegraph Company v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430;

Raymond v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78;

Louisville & Nashville Railroad Company v. *Greene*, 244 U. S. 522, 61 L. Ed. 1291;

Wilson v. *Illinois Southern Railway Company*, 263 U. S. 574, 68 L. Ed. 456;

Siler v. *Louisville & Nashville Railroad Company*, 213 U. S. 175, 53 L. Ed. 753;

Sterling v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375.

V.

The statutes impose an excise tax with respect to the gasoline sold measured by the quantity sold.

Opinion of Attorney General of Alabama, dated August 22, 1928 (R. 54);

Acts of Alabama Legislature (R. 3-8, 22-54).

VI.

An excise tax measured by the quantity of gasoline sold to the United States is a tax on the United States contrary to the Federal Constitution.

Panhandle Oil Corporation v. *State of Mississippi*, 277 U. S. 218, 72 L. Ed. 857;

Graysburg Oil Company v. *State of Texas*, 278 U. S. 582, 73 L. Ed. 519;

Indian Motocycle Company v. *United States*, 283 U. S. 570, 75 L. Ed. 1277.

VII.

A tax measured by the amount of gasoline withdrawn from storage for sale to the United States is a tax on a necessary and material ingredient of the sale and is, therefore, a tax on the United States contrary to the Federal Constitution.

See cases cited under Point VI, *supra*.

VIII.

A tax measured only by the amount of gasoline withdrawn from storage for use and which only accrues when the gasoline is withdrawn is not a tax for the privilege of storing, but is a tax for the privilege of withdrawing from storage for use.

Dawson v. *Kentucky Distilleries & Warehouse*, 255 U. S. 288, 65 L. Ed. 638;

Sheip v. *Amos*, 100 Fla. 863, 130 So. 699.

IX.

Taxes levied by the Alabama gasoline tax statutes are taxes on the consumer and are directly borne and paid by the consumer in the same form and to the same extent as imposed by such statutes.

Jefferson County v. *Hard*, 227 Ala. 201, 149 So. 81;

Gregg Dyeing Company v. *Query*, 286 U. S. 472, 76 L. Ed. 1232;

Monamotor Oil Company v. *Johnson*, 292 U. S. 85, 78 L. Ed. 1141;

See also abstracts of gasoline statutes in other States. (Exhibit C to Appendix to this brief).

X.

Official rulings of State Attorneys General as to the proper construction of ambiguous statutes when followed

for a long period of years by officials charged with the administration of such statutes prevent or estop the State from inflicting loss or penalties on a taxpayer where he, in good faith, has relied on such rulings and interpretations and has parted with his money or property on the strength thereof.

Dismuke v. *United States,* Manuscript, Advance Opinions L. Ed., Vol. 80—No. 8, page 375;

Indiana v. *Milk,* 11 Fed. 389;

Walker v. *U. S.,* 139 Fed. 409 (C. C. A., 5th, 148 Fed. 1092;

Curen v. *New York,* 79 N. Y. 511;

Philadelphia v. *Anderson,* 142 Pa. 357, 21 Atl. 976, 12 L. R. A. 751;

United States v. *Stinson,* 125 Fed. 907, 49 L. Ed. 724;

United States v. *Willamette,* 54 Fed. 807.

ARGUMENT.

I.

Jurisdiction.

(1) *A Three Judge Court Was Properly Convened.*

This was a case for the convening of a three judge court required by Section 266 of the Judicial Code (U. S. C. A., Title 28, Sec. 380). The plaintiff claimed that the Alabama gasoline excise tax statutes were unconstitutional and void because contrary to the Constitution of the United States (paragraph 10 of plaintiff's bill of complaint, R. 18, 19). None of these statutes have ever exempted taxes with respect to sales or with respect to withdrawals for sale of gasoline to the United States. While two State Attorneys General have rendered opinions that under the authority of the *Panhandle Oil* case, *supra,* the State could not collect

the gasoline taxes levied by the acts on transactions with the United States (R. 54-58, 126, 127), the present Attorney General has held the acts sufficiently broad to allow the taxation of such transactions (R. 59-69).

The principles announced by Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375, appear to be so applicable here that we quote from the opinion:

> "First. The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where State officials, purporting to act under State authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. *Ex parte Young*, 209 U. S. 123, 155, 156, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 28 S. Ct. 441, 14 Ann. Cas. 764; *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 227 U. S. 278, 292, 293, 46 L. Ed. 510, 516, 517, 33 S. Ct. 312; *Truax* v. *Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A. 1916D, 545, 36 S. Ct. 7, Ann. Cas. 1917B, 283; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456, 63 L. Ed. 354, 357, 39 S. Ct. 142; *Terrace* v. *Thompson*, 263 U. S. 197, 214, 68 L. Ed. 255, 274, 44 S. Ct. 15. The Governor of the State, in this respect, is in no different position from that of other State officials. See *Davis* v. *Gray*, 16 Wall. 203, 210, 233, 21 L. Ed. 447, 452, 457; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155, 81 A. L. R. 1402, 52 S. Ct. 595; *Binford* v. *McLeaish*, 284 U. S. 598, 76 L. Ed. 513, 52 S. Ct. 207; (D. C.) 52 F. (2d) 151, 152; *Sproles* v. *Binford*, 286 U. S. 374, 76 L. Ed. 1167, 52 S. Ct. 581. Nor does the fact that it may appear that the State officer in such a case, while acting under color of State law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 246, 76 L. Ed. 265, 272, 52 S. Ct. 133; *Fidelity & D. Co.* v. *Tafoya*, 270 U. S. 426, 434, 70 L. Ed. 664, 666, 46 S. Ct. 331.

"As the validity of provisions of the State constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 75 L. Ed. 135, 51 S. Ct. 8. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of State or Federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. *Silver* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 S. Ct. 451; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 303, 58 L. Ed. 229, 238, 34 S. Ct. 48; *Davis* v. *Wallace*, 257 U. S. 478, 482, 66 L. Ed. 325, 328, 42 S. Ct. 164; *W. T. Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116, 71 L. Ed. 566, 568, 47 S. Ct. 271."

Both an application for an interlocutory and for a permanent injunction were made and pressed by plaintiff to restrain the enforcement of the State statutes (R. 21, 93-94, 222, 223).

Stratton v. *St. Louis Southwestern Railway Company*, 282 U. S. 10, 75 L. Ed. 135;
Sterling v. *Constantin, supra;*
Brucker v. *Fisher* (C. C. A., 6th), 49 F. (2d) 759.

(2) *Amount in Controversy.*

In the telegram of June 17, 1935 to plaintiff, demand was made by the special agent of the State Tax Commission for alleged taxes on 1,300,000 gallons of gasoline, plus interest and penalty (25%), which aggregated more than $100,000 (R. 12, 13).

In addition to the amount of taxes claimed as past due, it is shown by the record that the plaintiff had at the time of the trial entered into two contracts with the United States,

one contract to deliver 134,165 gallons of gasoline to the War Department and to the Tennessee Valley Authority during the last three months of 1935 (R. 214). The tax claimed by the State on this gallonage will amount to $8,049.90. Plaintiff had also entered into a contract with the Department of the Interior to supply its requirements in Alabama for a nine months' period beginning October 1, 1935 (R. 214-221). The Company had submitted bids on both these contracts to the Government prior to the filing of its bill.

The value of the right of the Company to do business with the United States in Alabama without any lawful interference by the State also measures the amount in controversy.

Berryman v. *Whitman College*, 222 U. S. 334, 56 L. Ed. 225;

Hunt v. *New York Cotton Exchange*, 205 U. S. 322, 51 L. Ed. 821;

Bitterman v. *L. & N. Railroad Company*, 207 U. S. 205, 52 L. Ed. 171;

Packard v. *Banton*, 264 U. S. 140, 68 L. Ed. [illegible].

(3) *The Texas Company can Maintain the Suit.*

Plaintiff is the party against which the State is making the claim for the taxes and although the taxes are in substance and effect taxes on the consumer and the plaintiff a conduit for collection, yet plaintiff is liable for the collection and is liable for the penalties for failure to collect and pay same to the State.

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857;

Cummings v. *Merchants National Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903;

Hammer v. *Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101;

Pierce v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070;
Buchanan v. *Warley*, 245 U. S. 60, 62 L. Ed. 149;
Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131;
Savage v. *Jones*, 225 U. S. 501, 56 L. Ed. 1182;
Station WBT, Inc. v. *Poulnot*, 46 F. (2d) 671.

II.

Plaintiff Had No Adequate Remedy at Law.

Under the gasoline excise tax statutes in effect at the time this suit was filed and under the one which became effective October 1, 1935, persons dealing in gasoline were required to file a report with the State Tax Commission by the 20th of each month showing the amount of gasoline sold or withdrawn from storage during the preceding month and at the time of filing the report to pay the tax on account of the taxable transaction so reported (R. 45). For failure to file the report or pay the tax as provided, the taxpayer is subjected to a penalty of 25% of the amount of the tax (R. 52), and also for failure to make the reports as required, it is subjected to a fine of not less than $50 or more than $300 for each offense, each month of failure constituting a separate offense (R. 47).

The State Tax Commission is required under the act effective October 1, 1935, to immediately pay the gasoline taxes, when collected, to the State Treasurer and the State Treasurer is required by the 10th of the calendar month following the month of collection to distribute the proceeds of one-half of the taxes (3¢ of the 6¢ levy) equally among the sixty-seven counties of the State (R. 47). Pretermitting for the moment other considerations why Section 379 of the Revenue Act of 1935 set out in appellants' brief, page 28, did not afford plaintiff an adequate remedy at law, the fact that the statute requires a suit for refund to

be filed by the taxpayer within sixty days from the date of payment or else recovery is barred means that while plaintiff under the gasoline excise tax acts is required to pay taxes monthly, it would be under the necessity of instituting suits at maximum intervals of sixty days. To be safely within the sixty day statute, the taxpayer should institute a separate suit after each monthly payment. We quote the provision of the statute here relevant (Acts of 1935, page 568):

> "Whenever any taxpayer claims that any tax, except ad valorem taxes, herein levied, as fixed by the collecting officer is excessive or is invalid either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. Within sixty days after such payment under protest, the taxpayer shall commence suit against the officer for the recovery of such amount as is claimed to be excessive or invalid, and unless such suit is commenced within such period of sixty days from such payment, such payment shall be deemed voluntary."

The attorneys for appellants in their brief say:

> "By pursuing the remedy afforded by the 1935 statute, appellant, on the bare possibility of having to file one or more additional suits to keep the statute of limitations from running, can recover any amount which is erroneously paid, with interest at the legal rate of 6%" (Appellants' brief, page 31).

Counsel state the case mildly when they say that there is a bare possibility of having to file one or more additional suits to keep the statute of limitations from running. The only court which can authoritatively settle the question as to the liability of oil companies for the payment of the Alabama taxes with respect to gasoline sold to the United States is this Honorable Court. Under the present

Attorney General's interpretation of the refund statute, suits for refund can only be filed in the State Court. (See Exhibit B in Appendix to this brief.) A refund suit would ordinarily be filed in the State Circuit Court and before it was finally decided by the Supreme Court of Alabama and by this Court, more than twelve months would very probably elapse, even though all the parties used due diligence in prosecuting the case through all the courts. In the interim, neither the State officials nor anyone else could waive the mandate of the statute that suits during the pendency of the final decision be filed every sixty days for refund of the tax payments made subsequent to the payments involved in the test suit. Granting that it might be decided that the Federal District Courts had jurisdiction for the recovery of illegal taxes under the refund statute where the jurisdictional amount is involved, it would probably require an equal period of time to secure a final determination of the question in a suit commenced in the Federal District Court.

But this is not all. The State Tax Commission is required, upon the receipt of the gasoline taxes, to pay them over to the State Treasurer who by the 10th of the following month is required to distribute one-half thereof to the sixty-seven counties. This is required by the gasoline tax statutes and also by Section 380 of the Revenue Act of 1935, notwithstanding the taxes are paid under protest. We quote Section 380 (General Acts of 1935, page 569):

> "Whenever any money for taxes paid to any officer authorized to receive or collect same is paid under protest, such officer shall distribute to the various governmental agencies the proportion due such governmental agencies in the manner and at the times provided in this Act, and at the time of such distribution, shall note the fact that such payment was made under protest, and the Treasurer or custodian of funds of such governmental agency, shall in giving his receipt

therefor, note that such tax was paid under protest. Any Tax Collector or other officer authorized to receive and collect taxes noting such fact, shall not be personally liable for such payments should such taxes ultimately be held illegal or excessive."

The attorneys for appellants appear to concede that the distribution of the taxes after their receipt by the State is mandatory, though the taxpayer protest at the time of payment. We quote from page 31 of their brief:

> "Under the statute above quoted, if it be a fact that the Treasurer of the State is required to distribute the portion of the tax appropriated to the counties, it would nevertheless be the duty of the counties, upon the case being adjudicated, to immediately refund that part of such tax received by the individual county."

Section 103 of the 1935 Alabama Revenue Act is set out on page 29 of appellants' brief and provides that where counties are paid taxes subsequently judicially declared to have been illegally exacted, upon the presentation by the taxpayer of a certified copy of the judgment of the court, they shall refund to the taxpayer the portion of the taxes received by them adjudged to have been wrongfully collected. This requires a presentation of a certified copy of every judgment to the officials in each of the sixty-seven counties in each case filed by the taxpayer for a refund, should the taxpayer be declared entitled to refund in the suits filed by it.

In any aspect in which the Texas Company was confronted prior to the institution of this suit, had it not filed a bill in equity for injunction against the State officials charged with the administration and enforcement of the tax statutes, it would have been under the necessity of instituting a multiplicity of suits involving the same parties and the same issues of law to protect and preserve its legal rights pending the final determination of the controverted

question of its liability for the taxes on transactions had by it with the Government. We quote from the opinion prepared by Mr. Justice Stone in *Matthews* v. *Rogers*, 284 U. S. 521, 76 L. Ed. 447:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law or fact."

In *Wilson* v. *Illinois Southern Railway Company*, 263 U. S. 574, 68 L. Ed. 456, it was held that because a taxpayer had to sue in five counties, there was such a multiplicity of suits as to authorize that taxpayers resort to equity for an injunction restraining the collection of taxes claimed to be illegal. See also *Lee* v. *Bickell*, 292 U. S. 415, 78 L. Ed. 1337.

A statutory three judge court in *American Airways* v. *Wallace*, 57 F. (2d) 877, 879, held the refund statute of Tennessee not to afford an adequate remedy at law where it provided that suits for the recovery of excise taxes claimed to be illegal on those dealing in gasoline had to be instituted within thirty days from date of payment of the tax. We quote from the opinion:

> "In applying the test as to whether courts will entertain a suit in equity to enjoin the collection of a tax, the court must look to the probable consequences or damages resulting to plaintiff if the injunction is not granted. It is quite apparent that, from the facts averred in the petitions and admitted in the answers, if plaintiff is not liable for the tax, it does not have an adequate remedy at law, because the law provides for the payment of the tax monthly, on or before the 20th of each month succeeding the withdrawal, which may be paid under protest, and then the taxpayer has thirty days from date of payment, in which to bring suit for refund thereof. To force plaintiff to its remedy at

law would necessarily result in a multiplicity of suits, involving much expense in such items as attorney's fees, costs, etc."

The refunding statutes of 1935 are very probably void because violative of the Alabama Constitution as they authorize suits against the collecting officers only in their official capacities.

Section 14 of the Constitution of Alabama of 1901 is as follows:

> "That the State of Alabama shall never be made a defendant in any court of law or equity."

Section 380 of the 1935 Alabama Revenue Act, *supra*, provides that an officer collecting illegal taxes shall not be personally liable for such payments in suits instituted under the statute for refund. The party to be sued for the recovery of illegal taxes collected under the gasoline tax statutes as prescribed by the 1935 refund statutes is the State Tax Commission in its official capacity, even though the Commission is immediately required to pay over the funds collected to the State Treasurer who in turn distributes same to the counties and to the agencies of the State provided in the statutes. It is clear that such a suit would be a suit against the State. We quote from the opinion of this Court in *Smith* v. *Reeves*, 178 U. S. 436, 44 L. Ed. 1140 as follows:

> "We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a state, this suit, though in form against an officer of the state, is against the state itself."

It is true that the legislature in some states can waive the immunity of the State to suit, but the Constitution of Alabama does not so authorize the Alabama Legislature. We

quote from *Alabama Girls' Industrial School* v. *Reynolds*, 143 Ala. 579, 42 So. 114:

> "The solution of this question depends upon whether it is immune against being a defendant to any action or suit by that provision of the Constitution which prohibits the state of Alabama from being made a defendant in any court of law or equity (section 14 of the Bill of Rights), notwithstanding the act of its incorporation contains an express authorization that it may be sued. If the suit instituted against it is practically and really against the state—if the judgment and decree obtained against it must be satisfied, if at all, out of the property held by it, and this property belongs to the state, though the title is *eo nomine* in the complainant as an agent of the state—then clearly to permit an action or suit against it would be doing by indirection that which cannot be done directly. In other words, if the complainant is a mere state agency—a representative of the state, instituted and maintained by the sovereignty for the exercise of a governmental function—a suit against it is a suit against the state, just as much so as the action by *Comer* v. *Bankhead*, reported in 70 Ala. 493, and *Smith* v. *Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140, where the relief sought was against the defendant, 'as Treasurer of the state of California,' to recover money paid to him as such officer. In that case the court said: 'Although the state, as such, is not made a party defendant, the suit is against one of its officers as Treasurer, the relief sought is a judgment against that officer in his official capacity, and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint, * * * The manifest purpose of section 14 of the Bill of Rights was to prohibit the legislature from passing any act authorizing the State to be sued in any court, and clearly any authorization to that end would be void because in violation of the constitutional provision."

We also quote from the opinion of the Alabama Supreme Court in *The Alabama Industrial School* v. *Adler*, 144 Ala. 555, 42 So. 116:

> "There is not only no law giving the court capacity to entertain the complaint against the defendant, but there is the section of the organic law of the state which prohibits such capacity. There is no provision in the Constitution by which the exemption of the state from suit may be waived. The legislature is without competency to enact a statute allowing the state to consent to a suit against itself, and it would seem that, if the law-making body has no power to enact a law granting such consent, certainly any action on the part of an attorney, a mere agent of the state, would be futile in that respect and as a waiver of the state's exemption from suit.—*Ex parte State*, 52 Ala. 231."

See also *White* v. *Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454.

Conceding (though we think it a violent assumption in view of the above decisions) that the Supreme Court of Alabama would hold that the Legislature was authorized to waive the immunity of the State to suit, as it has impliedly attempted to do in Section 380, *supra* (the Alabama Supreme Court has not yet passed on this section), yet in view of the fact that such a suit would be one against the State and the Federal courts could not take jurisdiction, though the taxpayer as in this suit is a nonresident and the requisite amount in controversy is involved (*Smith* v. *Reeves*, *supra*), the statute would not offer an adequate remedy at law in the Federal court and could not therefore oust Federal equity jurisdiction.

It appears that under the provisions of Section 103 of the Revenue Act of 1935, where appeals are taken by a taxpayer from assessments fixed by the State Tax Commission, the appeals must be taken to the Circuit Court of Montgomery County, Alabama, or to the Circuit Court

of the county in which the taxpayer resides, if he has within the State a permanent residence. We quote a portion of the provisions of Section 103 not set out in the brief for appellants on page 29 and 30:

> "If any taxpayer against whom an assessment is made by the State Tax Commission under any assessment required by law to be made by the State Tax Commission, is dissatisfied with the final assessment as fixed by the said State Tax Commission, he may appeal from said final assessment to the Circuit Court of Montgomery County sitting in Equity, or, in cases other than public utilities, to the Circuit Court of the County in which the taxpayer resides if the taxpayer has within the State a permanent residence, at the option of the taxpayer, by filing notice of appeal with the Secretary of the State Tax Commission and with the Register of the Circuit Court of the County to which the appeal shall be taken within thirty days from the date of said final assessment."

Construing Sections 103 and 379 of the 1935 Revenue Act together, it would seem that the taxpayer is required to file suit for refund in the Circuit Court of Montgomery County, Alabama, if he has no permanent residence in the State. Consequently, the Texas Company, a nonresident, could only sue the State Tax Commission in the State Court of Montgomery County. In any event, the Supreme Court of Alabama has not construed these provisions, and their proper construction was and is a matter of great uncertainty and doubt. We quote from the opinion of this Court in *City Bank Farmers Trust Company* v. *Schnader,* 291 U. S. 24, 78 L. Ed. 628:

> "As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction. *Smyth* v. *Ames,* 169 U. S.

466, 516, 42 L. Ed. 819, 538, 18 S. Ct. 418; *Chicago, B. & Q. R. Co.* v. *Osborne,* 265 U. S. 14, 16, 68 L. Ed. 878, 880, 44 S. Ct. 431; *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 378, 388, 70 L. Ed. 641, 650, 46 S. Ct. 236; *Matthews* v. *Rodgers, supra* (284 U. S. 526, 76 L. Ed. 452, 52 S. Ct. 217.)"

See also opinion of statutory three judge court in *Southern Railway Company* v. *Query,* 21 F. (2d) 333.

As it is a matter of public record, we think we can properly point out to this Court that in a case subsequently brought in the same District Court as the case at bar against the officials of the State Tax Commission in both their official and individual capacities for a refund of license taxes paid under protest, the Attorney General and other attorneys representing the State have filed pleas to the jurisdiction of the District Court, copies of which pleas are set out as Exhibit "B" to the Appendix to this brief.

Attorneys for appellants further contend that a sufficient remedy was provided by a statute adopted in 1927 (General Acts of Alabama 1927, page 635) quoted in appellants' brief on page 24, or by a statute adopted in 1931 (General Acts of Alabama 1931, page 527) set out in appellants' brief, page 26.

There are several reasons why the contention of appellants that either one or both of these statutes afforded the Texas Company a sufficient remedy at law is unsound:

(a) These statutes are very probably repealed by the 1935 General Revenue Act. In this Act, the Legislature attempted to consolidate or restate the tax laws and attempted to give a new kind of remedy for refunds of taxes illegally collected, as evidenced by the above described Sections 379 and 380 of the Revenue Act of 1935. The sixty-day limitation for the institution of suits for refunds and the machinery to be employed to secure such refunds is

entirely inconsistent with the remedies prescribed in either the 1927 or 1931 Acts.

(b) Both the 1927 and 1931 Revenue Acts were considered in the case of *Butler* v. *Schulte,* reported in 67 F. (2d) 632, and were held not to afford taxpayers an adequate remedy at law, as there was no provision for the refunding of interest on the tax payments. This case was tried in the District Court at Birmingham before our late Judge Grubb and his decision was sustained by the Circuit Court of Appeals, Fifth Circuit, in an opinion prepared by Circuit Judge Hutcheson. Judge Hutcheson, who dissented in the case at bar, did not place any ground of his dissent on the proposition that the plaintiff in this case had an adequate remedy at law under either the 1927, 1931 or 1935 Acts (R. 238).

As neither the 1927 nor the 1931 Acts permitted recovery of interest, it seems that the following statement of this Court in *Hopkins* v. *Southern California Telephone Company,* 275 U. S. 393, 72 L. Ed. 329, is applicable:

> "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments. The county and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible."

See also

Nutt v. *Ellerbe,* 56 F. (2d) 1058, 1062;
Proctor & Gamble Distributing Company v. *Sherman,* 2 F. (2d) 165.

(c) The 1927 Act specifies no legal remedy to be employed, but provides that the taxpayer *may elect* to pay the

questioned taxes to the State Tax Commission pending the outcome of the controversy or litigation. It is not obligatory on the taxpayer to pay the taxes to the Commission. The statute applies as well to suits in equity as to those filed at law.

(d) The 1931 Act provides no remedy at law but merely prescribes that where a taxpayer under a mistake of law or fact has paid illegal taxes to the State Tax Commission, he can within one year from the date of payment apply to the Commission for a refund and if the Commission is satisfied that the refund should be made, it shall so certify to the State Auditor who draws his warrant for the amount to be refunded on the State Treasury. No appeal by the taxpayer is provided from a decision of the Tax Commission that the taxes were legally collected. In the last named event, the taxpayer is remediless as the State keeps the money where the finding of the Commission is adverse to the taxpayer. In the present case it would have been financial suicide for the taxpayer to have paid the taxes to the Tax Commission, as the Commission had already announced before the filing of this suit in letters to the Texas Company that it intended to follow the ruling of the Attorney General of Alabama of July 5, 1935, and collect the taxes with respect to the gasoline sold or withdrawn from storage for sale to the United States (R. 13, 85, 144). The agreed statement of facts also shows that the State officials intend to collect or attempt to collect such taxes unless enjoined or restrained from doing so by judicial order or decree (R. 113).

(e) The Supreme Court of Alabama has never to our knowledge held that either the 1927 or 1931 Acts afforded taxpayers an adequate remedy at law. That court has reviewed and considered cases on their merits originally instituted in the State Courts by complaining taxpayers

praying for an injunction to restrain the State Tax Commission from collecting excise or license taxes levied on gasoline dealers and other licenses levied on other parties. The jurisdiction of the equity courts seems to have been assumed, although this point does not appear from the opinions to have been raised in either case. These cases were instituted subsequent to either the 1927 or 1931 Acts or both.

Exchange Drug Company v. *State Tax Commission,* 218 Ala. 114, 117 So. 673;

Woco Pep Company of Montgomery v. *Butler Chairman of State Tax Commission,* 225 Ala. 256, 142 So. 509.

If the 1927 or 1931 statutes were plainly adequate to protect taxpayers where they were compelled to make illegal tax payments, there was no occasion for the Legislature of 1935 to set up new machinery for tax refunds, yet the attorneys for the appellants say that the purpose of the 1935 statute was to remove the threat of injunctive process. We quote from their brief, page 28, as follows:

> "The Legislature of Alabama by the General Revenue Act of 1935, Act #194, approved July 10, 1935 (General Acts 1935, page 256, *et seq.*), very carefully attempted to give a taxpayer, making an overpayment or a payment of taxes illegally exacted, adequate protection. In fact, we cannot but conclude that the statutes were written with the fixed purpose of removing the threat of injunctive process from the orderly administration of the tax statutes."

The Alabama Attorney General by letter dated November 22, 1928, advised the United States Attorney General that there was no provision in the statutes of Alabama providing for the refund of certain taxes erroneously paid and that none of the refunding statutes, in his opinion, applied to taxes paid under the gasoline tax acts (R. 59). This

letter was written more than a year after the so-called 1927 refund statute was adopted. On January 8, 1935, the State Tax Commission advised the Texas Company that there was no provision for refunds of taxes paid under the gasoline tax statutes (R. 142).

The cases decided by the Alabama Supreme Court, cited on page 24 of the brief for appellants, involved refunds of *ad valorem* taxes. The statutes of Alabama providing for the refund of *ad valorem* taxes erroneously paid have no application to refunds of excise taxes illegally demanded by the State Tax Commission. It is, therefore, respectfully submitted that none of these cases are in point.

The Supreme Court of Alabama has not passed on either the 1927, 1931 or 1935 tax refunding statutes. The most that can be said for the statutes or any of them is that it is uncertain that the Texas Company prior to the institution of this suit had a clear and adequate remedy at law. In this situation this Court has many times held that the taxpayer is warranted in resorting to equity rather than being forced to speculate or take the hazard of pursuing an uncharted or questionable course which in the end may avail him nothing, while in the interim the time limits fixed by the State are rapidly running against him.

Dawson v. *Kentucky Distilleries & Warehouse Company,* 255 U. S. 288, 65 L. Ed. 638;
Wallace v. *Hines,* 253 U. S. 66, 64 L. Ed. 782;
Shaffer v. *Carter,* 252 U. S. 37, 64 L. Ed. 445;
Union Pacific Railroad Company v. *Weld County,* 247 U. S. 282, 62 L. Ed. 1110;
Davis v. *Wakelee,* 156 U. S. 680, 39 L. Ed. 578.

It is very respectfully submitted that the finding of the District Court that the plaintiff had no adequate remedy at law (R. 223) is amply supported by the facts set out in the record.

III.

Equity Jurisdiction With Respect to Taxes on Future Deliveries of Gasoline under Contracts Between the Texas Company and the United States.

Both the right of the Company to contract in the future with the United States for the sale and delivery of gasoline by it to the Government and the amount of taxes with respect to the gasoline involved in the contracts in effect between these parties when the case was tried involved more than $3,000.

There were two contracts between the Company and the United States for future deliveries in effect, one to supply from the Company's terminal at Mobile for three months the United States Army with its requirements at Ft. McClellan and at Maxwell Field, Montgomery, Alabama, and also to supply to the Tennessee Valley Authority at Wilson Dam, Alabama, a specified quantity, and the other to supply for a period of nine months through service stations the Department of the Interior (R. 126). The first contract was signed by H. C. Maull, Jr., Chief, Purchasing Division of the Treasury Department (R. 195) and the second was signed by W. B. Fry, Purchasing Officer, United States Department of Interior (R. 216). The United States was obligated under these contracts and no one but the United States agreed to pay for the gasoline purchased thereunder. The contracts explicitly stated for what departments of the United States the gasoline was purchased, viz: the War Department, Tennessee Valley Authority, Bureau of Reclamation, the Administrative Division, Public Works Administration and other Interior Department activities. The State in this case has not pleaded or contended that any of the Federal departments to be supplied were invalidly or unconstitutionally created, or that the United States offi-

cials in entering into the contracts were acting outside the scope of their duties.

The decree of the lower court strictly limited its injunction to gasoline transactions by the Texas Company *with the United States.* By the terms of the decree the defendants were enjoined from collecting any of the gasoline taxes from the Texas Company "measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage and which is sold and delivered to the United States by it or for its account under contracts between it and the United States" (R. 224).

The attorneys for appellants, however, contend in accordance with the views expressed by Circuit Judge Hutcheson in his dissenting opinion that injunction should not be issued as to any future transactions between the Texas Company and the United States, because it would be of a supervisory nature and because (quoting from Judge Hutcheson's opinion):

> "What the State may not, neither may the Government, do. If the establishment of departments of liquor control, as in the South Carolina and Ohio cases, and the operation of a railroad, as in *Helvering* v. *Powers*, are not the exercise by the State of ordinary and usual governmental functions within the principle of exemption from Federal taxation, it would seem probable that some of the agencies which plaintiff's gasoline will activate will not be within the principle of exemption from State tax" (R. 239).

It is respectfully submitted that the departments of the Government to which gasoline was to be supplied under the contracts in effect at the time of the trial were departments within the principle of exemption from State tax. If the Texas Company is not liable to the State on account of the gasoline it delivers to these departments of the United States, then it is respectfully submitted that the Company

was entitled to an injunction restraining the State officials from carrying out their announced intentions to collect the tax, regardless of whether the court should have enjoined the defendants with reference to any other future gasoline transactions which the Company might have with the United States.

In another phase of the argument, attorneys for appellants contend that the Company was not entitled to maintain an equitable action for injunctions as to past transactions. If a taxpayer cannot ask for relief either as to past transactions or as to future transactions in which a tax liability is claimed, then it necessarily follows that it can never maintain a suit in equity even though it has no plain or adequate remedy at law.

Typical contracts under which the deliveries had been completed to the United States prior to the institution of this suit and the name of each department or agency to which deliveries were made are fully set out in the record (R. 128). The departments of the United States to which deliveries were to be made or will be made in the future are also fully set out in the record. Neither the dissenting opinion nor the brief for appellants points out a single department which is not within the principle of exemption from State tax. The State does mention in its brief that immunity was claimed as to certain of the gasoline sold to the Department of Agriculture and that a part of such gasoline may have gone to the Agricultural Adjustment Administration, which activity was held by this Court to be beyond the constitutional powers of the United States (Brief, page 33). However, unless the State plead on the trial below that some of the departments of the United States for which the United States had bought gasoline, were beyond the constitutional powers of the Government and therefore invalid, we respectfully submit that the State

is not now in a position to contend in this Court that some of the departments (which are unnamed) may be unconstitutionally created or exercising extra constitutional functions.

As we further understand the views expressed in Judge Hutcheson's dissenting opinion and some of the contentions advanced by attorneys for appellants, they are to the effect that while certain agencies or departments of the United States may be constitutionally created by the United States, the United States is powerless to clothe them with immunity from State taxation. This theory is apparently derived from the holdings of this Court in *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Helvering* v. *Powers*, 292 U. S. 620. As Judge Hutcheson expresses it: "What the State may not, neither may the Government, do" (R. 239).

The distinction between the total immunity of the United States from State taxation and the right of the United States to tax undertakings of a private nature engaged in by the State rests on differences in the powers vested in and exercised by each sovereignty. The United States is a government of limited and enumerated powers. It is, however, supreme when it constitutionally exercises any of the powers either expressly or impliedly granted to it by the State. The States have ceded this supremacy to the National Government. The sovereignty of the United States in its limited sphere is paramount and is immune from all efforts by the State to hamper or burden it in the exercise of these powers by taxation or otherwise. Of necessity the Federal Government cannot engage in functions of a non-governmental character.

A State by virtue of its reserved sovereignty may engage in private undertakings and when it does it subjects itself to certain liabilities, including the right of the Federal

Government to levy the same species of taxation on such private enterprise as the Federal Government could levy on individuals carrying on a like business.

We respectfully submit that since *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579, this Court has consistently held that the United States with respect to all the functions which it constitutionally exercises, is totally immune from taxation by the States.

In denying the power of the State of Ohio to tax the Bank of the United States in *Osborn* v. *Bank of United States,* 9 Wheat. 738, 6 L. Ed. 204, this Court said:

> "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. * * * The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services."

In *Smith* v. *Kansas City Title and Trust Company,* 255 U. S. 180, 65 L. Ed. 577, it was stated:

> "Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows."

In the *State of Alabama* v. *United States,* 38 F. (2d) 897, in which the State of Alabama claimed the right to tax the sale of surplus power manufactured by the Government at Muscle Shoals, the Court of Claims said:

"The United States is a government of limited and enumerated powers. There is no specially granted or implied power to engage in private business as such. In selecting the means to carry out and perform its constitutional powers the government may invade the field of what is called private business, and to the extent that it does it is performing what it can only perform—a public function. A State by reason of its original and reserved sovereignty may engage as a separate personality or corporation in what is called 'private business,' and thus subject itself to certain liabilities. But when the United States enters the field of so-called private business even as a separate personality or corporation, in order to effectuate certain of its granted powers, its action in so doing is a public act and it is not liable to be treated as a private individual and be subjected to taxation as such. *Clallam County* v. *United States, supra.* The court in that case said: 'The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends.' That is to say, it could invade the domain of private business in the form of a private corporation for its own convenience and to carry out its own ends, yet it would not be conducting business in a private capacity but as a governmental agency and so be exempt from taxation."

This case was subsequently dismissed by this Court for lack of original jurisdiction by the Court of Claims, *Alabama* v. *United States,* 282 U. S. 502, 75 L. Ed. 492, but the holding of the Court of Claims on the merits was not disapproved by this Court. In the opinion prepared by Mr. Justice Holmes, it is stated:

"If the claim is valid, which we are far from implying, it is under the State's original powers as such, and the only bearing of the Constitution is that it did not take the power away."

We also quote from *Willoughby on the Constitution of the United States,* Vol. 1, Second Edition, pages 144 and 145, as follows:

> "That a State may not, in the exercise of its reserved powers, interfere with a Federal governmental agency was settled once for all by the decision of the Supreme Court in *McCulloch* v. *Maryland.* This case was all the stronger in that the Federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was an agency neither essential to the National Government nor expressly provided for by the Constitution. The power to establish a National bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and, years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the constitutionality of the bank but had taken the position that, even were it constitutional, she had, under the general power reserved to her of taxing all occupations carried on within her territorial limits, the right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with the operation of a Federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate Federal power. In other words, the State took the ground that, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not properly be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one."

Certainly some of the departments of the United States, such as the War Department, which were to be supplied under the contracts at the time of the trial come within the principle of immunity from State taxation and to this extent at least the bill presented a case by equitable jurisdiction.

The fact that the Texas Company endeavored to give the District Court all the facts in its possession relative to its gasoline contracts with the United States, including the amount of gasoline to be delivered to each Federal department and the method of handling each of the transactions, should not we respectfully submit operate to penalize the plaintiff in the granting of any equitable relief to which it might be entitled as shown by the facts in this case. A separate suit could have been filed as to each Federal department to be furnished with gasoline, or as to each contract for future delivery entered into with the United States, but this we with deference submit is not the proper procedure by which to get the single controverted question as to tax liability legally decided.

IV.

Plaintiff's Right to Maintain the Bill in Equity as to Taxes Claimed by the State on Past Transactions.

Attorneys for appellants argue that in no event should the District Court have enjoined the State officials from collecting the taxes with respect to transactions consummated prior to the filing of the bill (Appellants' Brief, pages 19-23). The apparent position of the attorneys is that the Texas Company is compelled to wait until the State institutes an action at law for the delinquent taxes and then interpose its legal defenses in such action.

When the bill in equity in the case at bar was filed, no suit was pending against the Texas Company to recover

the alleged delinquent taxes, nor had one at any previous time based on such claim been instituted. Demand had been made on the Company by the State Tax Commission for the taxes claimed to be delinquent and the penalties and interest (R. 12). The Company was also informed before the present suit was filed that if the taxes were not paid on all gasoline withdrawn by it from storage and sold to the United States during the last preceding five years, a suit or suits would be instituted against it and that it would be subjected to penalties provided by the gasoline excise tax acts (R. 112). The officials also declared that they intended to collect or attempt to collect all the taxes held under the opinion of the Attorney General, dated July 5, 1935, to be imposed on the Company, unless they were enjoined or restrained from doing so by judicial order or decree (R. 113).

In this situation, the Company could not safely pay the large amount claimed, plus interest and penalties, to the State and at the same time protect its legal rights, as if it paid the amount demanded there was no certainty that it could recover from the State the amount so paid. It is probable that the only statutes applicable to refunds of taxes which accrued prior to October 1, 1935 (the effective date of the 1935 revenue statute), were the 1927 and 1931 statutes relating to refunds. Irrespective of whether it is contended that the 1927, the 1931 or the 1935 Act would apply to taxes paid prior to October 1, 1935, we think for the reasons already discussed above that neither statute afforded taxpayers an adequate and certain remedy for the recovery of illegal taxes paid under protest. The penalties were demanded by the State on the past transactions and certainly there is nothing in either the 1927 or 1931 statutes indicating that repayment of any penalties could be made on account of delinquencies in tax payments.

If the Company had waited until the State made the next move, it is uncertain which procedure the State might have employed in its efforts to collect the tax. The agreed statement of facts states that the Company was informed by the State officials that a suit or suits would be instituted, but the character of these suits is not stated nor did the State agree to withhold any summary remedy it might have. The gasoline tax statutes provide that the taxes levied by the acts, together with the penalties for failure to pay same, are secured by a lien on all the property of the taxpayer located in the State superior to all other liens except tax liens to the State antecedent in date (R. 42, 52). The acts also provide that if the taxpayer fails after ten days' notice from the State Tax Commission to appear before it and show cause why taxes held delinquent by the Commission should not be paid, a summary execution could be placed in the hands of any sheriff in the State for execution in the manner provided for executions issued from a court of record (R. 52), or the sheriff could proceed in the same manner provided by law for the collection of delinquent taxes by County Tax Collectors (R. 41). Section 6 of an Act adopted in 1932 (General Acts of 1932, page 57) provides that if gasoline dealers do not pay all the taxes levied on them for the carrying on of such business, the State Tax Commission may revoke their license to deal in gasoline in the State (R. 17).

This Court has on many occasions held that State officials may be enjoined from taking steps to collect illegal taxes claimed by the officials to be delinquent where the taxpayer has no adequate remedy at law to protect his rights, and where the facts show that the complaining taxpayer might likely or probably sustain injury if an injunction is not granted.

There does not seem to be any distinction between enjoining the collection of illegal taxes to accrue in the future

and enjoining the collection of illegal taxes already accrued where the taxpayer has no adequate remedy by which he can protect himself. Of course, if the disputed tax is already in process of litigation which will determine the rights of the parties, equity courts will not entertain a suit to determine the same legal issues involved in the pending suit. We respectfully call the Court's attention to the following cases holding that taxpayers have the right to enjoin tax officials from collecting delinquent taxes claimed by the taxpayers to be illegal. We quote the following language in *Western Union Telegraph Company* v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430:

> " 'The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.'
>
> "This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of Ex parte Young, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed, and the cause remanded for further proceedings."

In the *Ohio Tax* cases, 232 U. S. 576, 58 L. Ed. 737, this Court said:

> "The right to invoke the equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (Sec. 117 of act; Sec. 5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act."

We also quote from *Terrace* v. *Thompson*, 263 U. S. 197, 68 L. Ed. 255:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

See also

Raymond et al. v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78;

Louisville & Nashville Railroad Company v. *Greene*, 244 U. S. 522, 61 L. Ed. 1291;

Wilson v. *Illinois Southern Railway Company*, 263 U. S. 574, 68 L. Ed. 456.

Aside from other considerations, if this Court has jurisdiction it extends to every question involved. We again

quote a part of the opinion in *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375, as follows.

> "The jurisdiction of the District Court, so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 S. Ct. 451; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 303, 58 L. Ed. 229, 238, 34 S. Ct. 48; *Davis* v. *Wallace*, 257 U. S. 478, 482, 66 L Ed. 325, 328, 42 S. Ct. 164; *W. T. Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116, 71 L. Ed. 566, 568, 47 S. Ct. 271."

It would, we respectfully submit, have been an anomaly for the District Court, after concluding that there was no liability by the Company with respect to any of the gasoline involved in its transactions with the Federal Government, to have only enjoined the State officials from collecting taxes on future transactions and to have left them free rein to institute such proceedings as they might decide to pursue with respect to the gasoline already sold and delivered to the United States. Equity does not grant relief piecemeal, but having assumed jurisdiction it endeavors to dispose of all the controverted issues.

After all we cannot see that it is a matter of much practical importance to the State to have the future transactions decided in one suit and the past transactions in another. If this Court should pass only on the future transactions, we suppose its decision will materially influence the State in concluding what course it will pursue as to the transactions completed prior to the institution of this suit.

As we see it, the same legal questions are involved in both the prior and subsequent transactions, except that as to the transactions consummated prior to the Attorney

General's last opinion of July 5, 1935, it is believed that the Company occupies an additional strong ground in that the State cannot now repudiate the assurances given the Company and other taxpayers similarly situated, both through official rulings of its two former Attorneys General and by letters and rulings of the State Tax Commission, that there were no taxes due under the gasoline tax statutes with respect to the gasoline sold and delivered by the Company to the United States.

THE MERITS.

V.

The Alabama Gasoline Tax Statutes Impose an Excise Tax for the Privilege of Selling, Distributing or Withdrawing from Storage Gasoline and as to the Gasoline Sold the Tax is Measured Exclusively by the Number of Gallons Sold.

(1) *History of the Alabama Gasoline Tax Statutes.*

Appellants contend that the tax statutes with respect to the gasoline sold and delivered in Alabama by the Company, including that gasoline sold and delivered by it to the Government, impose a tax upon the privilege of storing, which tax accrues upon and is measured by the amount of gasoline withdrawn from such storage (Appellants' Brief, page 33). It is the position of appellee, in accordance with the holding of the District Court, that as to the gasoline sold by the Texas Company and other dealers similarly situated, the tax levied by the statutes is measured exclusively by and is based upon the sales and accrues as the sales are consummated.

In view of the wide variance of the parties as to the proper interpretation of the acts, the task devolves upon

this Honorable Court to construe the acts, provided the highest courts of Alabama have rendered no authoritative decision construing the statutory provisions involved in this case.

Siler v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753.

As we are of the conviction that the Alabama Supreme Court has not rendered such a determinative decision, it is thought a brief resume of the statutes will be of assistance in arriving at the intent and proper construction of the same.

The first statute imposing gallonage taxes on the business of dealing in gasoline was that adopted in 1923 (Exhibit A of Appendix to this brief), levying a tax of two cents per gallon based solely on the number of gallons sold. The tax was required to be paid by every "distributor" and "retail dealer" and the parties coming under these classifications were defined in Section 1 of the Act as follows:

> "The term "distributor" shall include any person who shall engage in the selling of gasoline as herein defined in this State by wholesale in domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term "retail dealer" shall include any person herein defined as "distributor" who is also engaged in the sale of gasoline as herein defined, at any place in this State, in broken quantities."

All the subsequent gasoline tax statutes have defined these words, where used therein, in exactly the same or substantially the same manner:

Section 1, First 1927 Act. (R. 22);
Section 2, Second 1927 Act. (R. 3);
Section 1, 1931 Act. (R. 26);

Section 1, 1932 Act. (R. 32);
Section 1, First 1935 Act. (R. 37);
Schedule 156, General Revenue Act of 1935. (R. 54).

The Act of 1923 had been interpreted by the Attorney General of Alabama as levying a valid tax with respect to sales by gasoline dealers to the United States (R. 91). This Act was in effect and the taxes were being collected on sales to the Government in accordance with the ruling of the Attorney General when the Legislature adopted the two 1927 Acts. The *Panhandle* case had not been decided by this Court, the date of the decision being May 14, 1928.

Aside from doubling the tax rate from two to four cents per gallon, what could have been the factors influencing the Legislature in 1927 in changing the phraseology of the 1923 Act from an excise based on sales alone to an excise based on "selling, distributing, or withdrawing (gasoline) from storage for any use"? It certainly could not have been for the purpose of taxing gasoline which was sold and delivered in the State to the Federal Government, because, as just pointed out, the State was already collecting taxes with respect to such transactions.

The answer to the question is the State desired to tax those domestic consumers who were bringing gasoline into the State and storing it until needed by them, thus avoiding the payment of the tax levied by the 1923 Act. A large source of revenue was escaping the State by the method followed by such consumers. This problem had been presented in other States and the Legislature of Alabama in casting about for a suitable method by which to plug the loophole in the 1923 Act came across the 1925 statute of the neighboring State of Tennessee which appeared to successfully solve the problem. The Alabama Legislature thereupon adopted the two statutes of 1927 which were modeled very closely after the Tennessee statute, the lan-

guage in the Alabama Acts being strikingly similar in all respects here important to the provisions contained in the Tennessee statute. A portion of the 1925 Tennessee statute is set out by the Supreme Court of that State in *Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 976. The attorneys for appellants state the facts as to the adoption by the Legislature of Alabama of the Tennessee statute as follows:

> "The language used in the Alabama statutes was taken almost literally from the gasoline excise tax levied by the laws of Tennessee of 1925, and as subsequently amended. These statutes of Tennessee contained, as does every statute of the State of Alabama enacted since 1927, the express legislative declaration that 'the tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors, storing any of the products mentioned in this act, and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use.'"

The purpose of the Legislature of Tennessee in amending its 1923 Act, which levied a tax as did the 1923 Alabama statute measured only by sales, is clearly related by the Supreme Court of Tennessee in *Foster & Creighton Co.* v. *Graham, supra,* in the following language:

> "It will be seen that the Act of 1923 imposed a tax on 'dealers,' and measured it by the quantity of gasoline 'sold or distributed' by them, and the term 'dealer' was defined as one engaged in the business of 'distributing or selling gasoline.'
>
> "The Act of 1925 extended the scope of the Act of 1923 so as to include, not only those engaged in selling gasoline, but also those engaged in storing it, and then withdrawing it for sale or other use.
>
> "The original act expressly excluded from its operation gasoline while it was in interstate commerce

(Sec. 2). All other gasoline, when sold or distributed, was included in the calculation of the tax.

"We think the effect of the amendatory Act of 1925, when properly interpreted, is to reach gasoline that is stored and thereafter withdrawn and used without being sold by any person, etc.

"Under the Act of 1923, a large consumer of gasoline, desiring to escape the tax levied by the act, could do so by buying his gasoline in quantities, say in tank lots, storing it, thereafter withdrawing it, and using it as needed. In such case there would be no intrastate sale or distribution within the meaning of said act, and such consumer would not, therefore, be subject to the tax.

"It was manifestly the purpose of the legislature in passing the amendatory act to cut off this avenue through which large consumers might evade the tax.

"We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but applies to consumers who purchase gasoline in intrastate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, whether such withdrawal be for sale or other use."

It is so clear as to be beyond argument that the Legislature of Tennessee in passing the 1925 statute did not abrogate the tax previously in effect on gasoline measured by sales where the commodity was sold. It added a tax, namely, that on withdrawing gasoline from storage so as to tax the domestic consumers who brought into Tennessee and stored the gasoline needed to fulfill their respective requirements.

The problem that confronted the Legislatures of Tennessee and Alabama has been encountered and successfully coped with in other States. This Court in *Gregg Dyeing Company* v. *Query*, 286 U. S. 472, 76 L. Ed. 1232, 84 A. L. R. 831, quoted from the opinion of the South Carolina Su-

preme Court in the same case, which showed the tax there involved was a complementary tax enacted to tax consumers bringing into the State of South Carolina their own requirements and storing them for their own account. The State of South Carolina retained its original tax applying to dealers in gasoline. We quote from the *Gregg Dyeing Company* case as follows:

> "In South Carolina, commencing about a decade ago, the General Assembly expressed its public policy as to revenue to be derived from the use of gasoline, vol. 32, Stat. at L., p. 835. The tax then imposed was two cents a gallon. In 1925, the tax was increased to five cents, and in 1929, to six cents on the gallon. These statutes, however, only reached 'dealers' in this commodity. * * *
>
> "Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown. Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in gasoline in quantities from without the State, and storing it for their own purposes, the Legislature of 1930 enacted the statute under consideration, applying the six cents tax to every person, firm, corporation, municipality or any subdivision subject to its terms. * * * Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of six cents per gallon, no matter what the origin of, or State in which, the gasoline is produced."

The Supreme Court of Tennessee had construed the 1925 Tennessee Act in *Foster & Creighton Co.* v. *Graham, supra,* many months before the adoption by Alabama of the 1927 Acts, the date of the decision in this case being July 3, 1926. It is elementary that when a State adopts a statute of another State which has already been construed by the highest courts in the State of original adoption, it is the

intent to adopt the statute as construed by the courts of the first State enacting the measure, in the absence of any evidence to the contrary.

The attorneys for the State are apparently construing the decision by this Court in *N., C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730, as holding that the 1925 Tennessee statute imposed only a "storage" or "withdrawal from storage" tax on gasoline sold by dealers or distributors in that State to their customers and that by analogy the same interpretation must be placed on the Alabama statutes. The attorneys for appellants in speaking of the effect of the holding by this Court in the *N., C. & St. L. R. Co.* case say:

> "It is submitted, however, that this is a clear recognition by this Court that the Tennessee statute meant just what the legislative declaration said it did—that the tax was a tax upon the storage and withdrawal from storage of gasoline within the State and not otherwise. In this regard the statutes of Tennessee are identical with the statutes of Alabama here involved" (Brief of Appellants, p. 47).

As we conceive it, the conclusion reached by the attorneys ignores the facts involved in the *N., C. & St. L. R. Co.* case. As stated by Mr. Justice Stone, the appellant was a rail carrier purchasing gasoline without the State and thereafter bringing it into the State and placing same in its own tanks. None of the gasoline was sold but was withdrawn as needed for use as motive power in the carrier's interstate railway operations (page 265 of 288 U. S.). Of course, *this* gasoline was subject to the tax measured by storage or withdrawals from storage. This was the very situation the Tennessee Legislature successfully sought to meet when it amended the 1923 Act in 1925. We find nothing in this Court's opinion tending to indicate that the tax with respect to gasoline *sold* by dealers in Tennessee was

measured by storage or withdrawals from storage rather than by the amount sold. We do not think this Court intended to change, limit or modify the holding of the Tennessee Supreme Court in *Foster & Creighton Co.* v. *Graham, supra,* as that case is cited by this Court in support of its holding. If anything, this Court seems to recognize there was a tax on the business of selling, as well as on the business of storing or withdrawing from storage. We quote from the opinion of this Court:

> "Chapter 58, Tennessee Public Acts, 1923, as amended by chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons * * * and corporations engaged in or carrying on the business * * * of *selling* or storing or distributing gasoline * * *,' within the state at the rate of 2¢ per gallon on the gasoline *sold* or stored, the tax 'to be used solely in the construction and maintenance of a highway system in the state.'" (Emphasis supplied.) (288 U. S. page 265, 77 L. Ed. page 737.)

We are under the impression that this Court confines its decision to the facts presented by the record in a case being reviewed by it, and we can find nothing from the report of the *N., C. & St. L.* case to indicate that the question of the taxability of local sales of gasoline in Tennessee was before this Court for consideration or decision.

The attorneys for appellants seek also to give the same construction to the holding of the statutory three judge court in *American Airways* v. *Wallace,* 57 F. (2d) 877, as they do to the holding of this Court in the *N., C. & St. L.* case, *supra* (Brief, page 47). The facts are very similar in the two cases, the principal difference being that in the *Airways* case, the complaining taxpayer was a carrier by plane rather than by rail, but secured and handled gasoline for its planes in the same manner in which the Railway

Company did. We think what we have stated above with reference to the *N., C. & St. L.* case also applies here. We quote the following significant language from the opinion in the *Airways* case:

> "Chapter 58, Pub. Acts of 1923, imposes a tax upon all persons, corporations, etc., engaged in and carrying on the business of 'selling' gasoline and distillate in the State. Chapter 67, Pub. Acts of 1925, amends Chapter 58, Pub. Acts of 1923, increases the tax and *enlarges the scope of the law* so as to include 'storers' and 'distributors' of gasoline. It provides that 'storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions' and that the tax shall accrue whether such withdrawal be for sale 'or other use.'" (Emphasis supplied.) (Page 878 of 57 F. (2).)

The phraseology of the 1927 Acts has been so closely followed in all the subsequently enacted Alabama gasoline tax statutes that the same interpretation must be given to all the acts, in so far as their provisions are relevant to this case. This was the view of the District Court as expressed in its opinion in this case.

> "There are several other Acts passed imposing additional taxes aggregating six cents per gallon, but they contain the same verbiage so the construction of one applies to all."

The 1932 Act added a tax on the business of refining, but that has no important bearing on the questions involved in this case, as all the gasoline in controversy was refined outside of Alabama. In the last 1935 Act, the privilege of "storing" *eo nomine* was added to the privileges previously taxed. However, the same privileges taxed in all the other acts adopted subsequent to 1923 are taxed in the 1935 Act in the same manner as they were taxed in the previous acts, which privileges are "selling, distributing or with-

drawing from storage." The word "storing" is added in the disjunctive and it appears to us that this strengthens our contention that there are now and have been since the 1927 Acts were adopted several privileges taxed in the alternative, but it is clearly the intent of the Acts that when the tax is paid for the exercise of one of the privileges named in the Acts, there is due no tax on account of the other privileges. For example, the tax with respect to the gasoline sold is measured exclusively by the quantity of gallons sold and no other privilege tax with respect to or measured by that gasoline is levied or imposed by the Acts.

(2) *Interpretation of the Gasoline Tax Statutes Based on the Language Therein Employed.*

None of the taxes now claimed by the State were levied by the 1923 Act which imposed a tax based only on sales. All of the statutes enacted subsequent to the 1923 Act purport to levy a tax on the same parties, namely, distributor, retail dealer or storer, except in the 1932 and subsequent acts the word "refiner" is added. The business of refining as such has never been taxed by the statutes. All the acts adopted since 1923 purport to tax in the alternative the following privileges: selling, distributing or withdrawing from storage, except that the last 1935 Act adds the term storage which it purports to tax in the alternative along with the other acts named.

For convenience, Section 2 of the first 1927 Act is set out and following it is Schedule 156.1 of the Revenue Act of 1935:

> "SECTION 2. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gas-

oline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once" (R. 22).

"SCHEDULE 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once" (R. 45).

To contend that the business of selling gasoline is not taxed is to do violence to the plain phraseology contained in each of the acts. The same is also true if it is contended that the business of distributing is not taxed.

The acts define the term "distributor" to include anyone who engages in selling gasoline in the State by wholesale domestic trade. Therefore, a party who is engaged in "distributing" is one who sells at wholesale to the domestic trade. A "retail dealer" is defined in all the acts as including persons defined in the acts as distributors who are also engaged in the selling of gasoline in the State in broken quantities.

If the Legislature did not intend to retain the tax on the business of selling originally incorporated in the 1923 Act, or if it did not intend to tax the business of distributing first named as a taxable occupation in the 1927 Acts, it is

difficult to understand why these taxable privileges are named in all the acts subsequent to 1923. If it had been the purpose to impose a tax based only on storage or withdrawals, the statutes could have been very materially shortened and simplified and all the gasoline used as a basis for the taxes now levied could have been used to measure a storage or withdrawal from storage tax. We respectfully submit that the Legislature intended to and did tax both the privilege of selling and the privilege of distributing.

The following provision appears in the 1927 and subsequent acts:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

This is the last provision in the acts relating to the imposition of the tax or specifying on what basis the tax should be computed and paid. It is a well recognized canon of statutory construction that if there is any ambiguity in the statutes, the last provisions appearing therein are presumed to reflect the controlling intent of the lawmaking body.

The above quoted provision plainly provides that "sellers" of gasoline may compute and pay the tax based on sales. Refiners, storers and distributors are required to compute and pay the tax on the basis of their withdrawals *or* distributions. A distributor, therefore, pays his tax

based on his distributions, which means the payment of the tax is based on the "selling of gasoline in this State by wholesale domestic trade." Counsel for appellants on page 60 of their brief try to draw a distinction between the use of the verb "may" in the latter part of the quoted sentence and the word "shall" in the previous part of the sentence. They say the word "may" is permissive and the word "shall" is imperative. (Appellants' brief, page 60). The word "may" is the expression last used in the sentence with reference to computation of the tax on sales and is controlling. Moreover, the word "shall" is used in the last part of the sentence with reference to refiners, storers and distributors and from this expression these persons are required to pay the tax on the basis of their withdrawals *or distributions.*

There is no conflict in the provisions of the quoted sentence. The first part of the sentence merely provides that the excise tax imposed by Schedule 156.1 shall apply to persons storing gasoline and distributing the same or allowing the same to be withdrawn from storage. The tax imposed by Schedule 156.1 is one tax of six cents per gallon either upon the "selling, distributing, storing or withdrawing from storage." A storage tax is not the only tax imposed by this schedule but taxes on the other named privileges are levied in the disjunctive. Of course, one of these taxes applies to persons storing gasoline just as other taxes apply to the business of selling or distributing. If Schedule 156.2 had provided that all persons storing gasoline and withdrawing same for any purpose were subject to the storage or withdrawal from storage tax levied in Schedule 156.1, there might be some basis for the argument of appellants, provided further that the last part of the sentence in Schedule 156.2, which allows sellers to compute and pay the tax based on their sales and distributors to

compute and pay the tax on the basis of their distributions had been omitted. However, it is respectfully submitted that the sentence contained in the statute is plain and affords no sound basis for the contention that it was the intent of the Legislature to require *sellers or distributors* to compute and pay the tax on gasoline sold or distributed by them upon the basis of the amount of gasoline stored or withdrawn from storage.

In the brief for appellants it is further stated that as all the gasoline which the Company sells in Alabama is brought from Port Arthur, Texas and stored in the State before any of it is sold or distributed, the Company is a storer within the definition of Section 1 of the Act, which provides that the term "storer" shall include any person who ships or causes to be shipped or receives gasoline in the State and stores the same in any manner and withdraws or uses the same for any purpose (Brief, pages 59 and 60). By the same token, the Texas Company is also a distributor as defined in the Act, as it sells at wholesale, and is also a retail dealer according to the statutory definition as it sells gasoline in broken lots. Schedule 156.2 of the last 1935 Act and the corresponding sections of the other acts plainly provide that refiners, storers and distributors shall compute and pay the tax on the basis of their withdrawals or distributions, which we interpret to mean that the distributors pay on the basis of their distributions. This schedule also very plainly specifies that sellers may pay the tax based on their sales.

The Texas Company occupies a dual status under the acts; as to the gasoline it brings into the State and stores and uses for its own requirements it is subject to the tax based on storage or withdrawals from storage; if it gives its gasoline away in the State, it is likewise subject to the same tax. However, as to the gasoline it sells or distrib-

utes, it pays a tax based only on the amount sold or the amount distributed.

It is further stated in appellants' brief that the tax is primarily one on storage, but when the gasoline in some manner has escaped that tax, the handling of such gasoline is subject to a tax measured by the quantity sold (appellants' brief, page 59). It is difficult for us to conceive that there could be a tax collected on account of sales of gasoline in Alabama which would not also be subject to a storage tax, for even if the gasoline was brought into the State by the seller in original containers a storage or a withdrawal from storage for use tax could be imposed and collected thereon, after the gasoline had come to rest, upon its withdrawal for use.

No provision of any of the statutes nor any decision or ruling is cited by appellants to sustain their novel interpretation of the states that it is only when the gasoline has in some manner escaped the storage tax that the handling of the gasoline is subject to a tax measured by the quantity sold. To say that the tax is successively laid on storage or withdrawals from storage and then on sales only where gasoline cannot be reached by the storage or withdrawal provisions is, we respectfully submit, placing an interpretation on the acts not warranted by any language therein contained.

The later provisions in all the acts show that they impose a tax based on sales as well as one on withdrawals and the sale is always the privilege first mentioned. For example, Schedule 156.14 of the last 1935 statute provides that if any person liable for the tax fails to make the prescribed monthly returns and pay the excise tax "on or before the 20th day of the month following the sale, distribution or withdrawal" the Commission shall make a return for the

delinquent taxpayer and assess the tax and penalties (R. 52).

The Texas Company with respect to the gasoline sold and delivered to the United States occupied either the status of a distributor or of a retail dealer, as all of such gasoline was either sold from the Mobile terminal in tank car lots or from bulk stations in barrels or other containers or from the service stations in retail quantities. Therefore, as to all this gasoline, if the Texas Company was legally subject to any tax at all, it was subject to the tax on selling or on distribution and the amount of such tax should be computed and measured by the amount so sold or distributed. And such a tax in respect of sales made to the United States would, we submit, clearly be controlled by the decision in the *Panhandle Oil* case (*Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857).

(3) *Administrative Interpretations of the Alabama Gasoline Tax Statutes.*

Soon after the decision by this Court in the *Panhandle* case, the Attorney General of Alabama rendered an opinion to the State Tax Commission, dated August 22, 1928, holding that as the 1927 statutes levied a tax on the sale of gasoline where there was a sale the tax imposed under these statutes could not be collected with respect to the gasoline sold to the United States (R. 54-58). We quote several excerpts from this opinion:

> "In reply will say that the reasons given in said opinion by the Supreme Court of the United States for the unconstitutionality of the Mississippi law, as applied to sales of gasoline to the United States by a distributor, apply with equal force to the statutes of the State of Alabama, whether the Act of 1923, or that of 1923, as amended Acts, 1927, page 326, et seq."

* * * * * * *

"The tax levied by the State of Alabama is 'an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use.' The tax levied by the State of Mississippi is that 'any person engaged in the business of distributing gasoline or retail dealer in gasoline shall pay for the privilege of engaging in such business an excise tax of one cent per gallon upon the sale of gasoline.'

"It is quite evident, when the reasons given by the United States Supreme Court are considered, that such reasons are as applicable to the Alabama law as to the Mississippi law. When a sale is made by a distributor, retail dealer or storer of gasoline to the United States, whether Alabama or Mississippi no tax can be collected on such sale from either the seller or purchaser, and no tax can be exacted of the seller measured by the number of gallons of gasoline so sold.

"Mississippi taxes the business with a tax measured by the number of gallons sold, while Alabama taxes the sale of each gallon sold at two cents per gallon. Alabama also taxes the distributing or withdrawing from storage for any use. It *taxes but once, and where there is a sale, the tax is on the sale.* Where there is no sale, but a distribution or withdrawing from storage for some use, other than selling, there is a tax on such withdrawal or distribution. We are not here considering such withdrawals, but only sales to the United States." (Emphasis supplied.)

The foregoing opinion was followed by another opinion of the Attorney General of Alabama to the Attorney General of the United States, to the effect that refunds of taxes paid under the gasoline statutes could not be made, but that if refund was made the Legislature would have to make provision for it (R. 58).

On July 14, 1933, the Attorney General of Alabama, who was successor to the Attorney General who had rendered the opinions in 1928, rendered an opinion to the State Forester in reply to the latter's request as to whether

State and County taxes on gasoline, oil and grease apply to gasoline used in motor vehicles owned or leased by the Federal Government, advising that in his opinion the gasoline so purchased by the United States was not subject to the tax (R. 127).

The Alabama statutes were uniformly administered by the State Officials from August 22, 1928, to July 5, 1935, in line with the rulings of the Attorneys General. On the date last mentioned, the present Attorney General rendered an opinion that as the statutes levied a tax on storage measured by the gallons withdrawn from storage, the State could collect the tax with respect to the gasoline which had been sold to the United States (R. 59-69). The opinion of July 5, 1935 was the first official ruling changing the construction of the gasoline statutes which had been placed thereon by the previous Attorneys General from 1928 up until that date.

During this period the State Tax Commission by letters and circulars gave assurances to the Texas Company that there was no tax with respect to the gasoline sold by it to the United States. The last communication of this character was a letter from the Commission dated March 11, 1935 (R. 143). The other communications are set out in the record on pages 137 to 142. In one of the communications to the Texas Company, the State Tax Commission advised as follows:

> "In other words when the gasoline passes from you to a customer, the tax accrues, but it does not accrue when the gasoline only passes from one of your storage tanks to another and remains your property."

The Texas Company did not include in the price of the gasoline which it sold and delivered to the United States any of the taxes levied by the gasoline tax statutes (R. 96). The returns show that the taxpayer was treating this

gasoline as exempt from the State tax (R. 130-136), and the State Tax Commission with knowledge of this fact never from the date of the *Panhandle Oil* decision until June 17, 1935, made any claim or demand that there was any liability for taxes on account of these transactions (R. 122).

Forms were prepared by the State Tax Commission and were forwarded to the taxpayers with separate blanks for the monthly report of sales and of withdrawals from storage (R. 130-136). These forms provided for separate and distinct calculations of two classes of gasoline, dependent on whether it was sold within the State or withdrawn for use other than sale within the State. Certainly it cannot be contended that any of the gasoline which was included under the sales items was required to be also included under the items relating to withdrawals from storage. In the instructions appearing on the forms the State Tax Commission specifically required that sales and withdrawals must be entered separately, and they cannot be construed in any other manner than that they mean that all sales must be included under one item and that all withdrawals for use other than sale must be included under another item. One of the instructions appearing on the forms is as follows:

> "This return is required of all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama."

It is clearly apparent from this provision that the interpretation of the Commission was that the provisions of the acts imposing the tax based on sales not only applied to sales which the taxpayer made to its retail customers or other consumers, but also applied to sales which the

taxpayer made to retail service stations which in turn sold the gasoline at retail. The State Tax Commission from the date of the *Panhandle* decision, July 5, 1935, never computed the taxes payable by the dealers in gasoline in this State on any other basis than by computing the taxes with respect to the gasoline sold by the amount of such sales, and with respect to the gasoline withdrawn from storage for use other than sale by the amount so withdrawn from storage (R. 124).

Attorneys for appellants contend that the "liberality" of the State Tax Commission in so construing the gasoline tax statutes can avail the Texas Company nothing. We respectfully submit that it was not out of a sense of generosity that the Commission was so construing the statutes, but it was following the official rulings of the Attorney Generals of Alabama by which rulings it was bound.

It is, of course, well recognized that, while long continued administrative interpretations of an ambiguous statute by the officers charged with the enforcement thereof are not conclusive as to the meaning of the statute, such interpretations are nevertheless very persuasive in arriving at the legislative intent. This is especially true where the Legislature reenacts the same statutes or ones substantially identical with knowledge of the interpretations placed thereon by the officials. The statutes of 1931, 1932 and the first statute of 1935 were adopted in the light of the rulings of the Attorney General and of the system of administering the previously adopted statutes. We do not think the ruling of the Attorney General of July 5, 1935, could possibly have had anything to do with influencing the Legislature with respect to the General Revenue Bill approved by the Governor on July 10, 1935. [See affidavit of Howell Turner, Secretary of State, to the effect that the Revenue Bill of 1935 was introduced in the Legislature on May 3, 1935, and that Schedules 156.1 and 156.2, which

are the provisions here important, were not changed from the date of the original introduction of the measure until the act was finally passed on July 3, 1935, except the numbers assigned to these sections were changed (R. 105-107).]

This Court has many times laid down the controlling principles with respect to the weight to be given to administrative interpretations of statutes by the court in arriving at their proper construction. We quote from *Surgett* v. *Lapice*, 8 How. 48, 68, 12 L. Ed. 982, 991:

> "The foregoing construction being the one adopted by the departments of public lands soon after the Act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the commission of the general land office, acting in accordance with the opinion of the Attorney General, and which had the sanction of the Secretary of the Treasury and of the President of the United States."

From *Union Insurance Company* v. *Hoge*, 21 How. 35, 16 L. Ed. 61, 68:

> "The practical construction of this Act of 1849 by the public officers of the State, including the Attorney General, who were required to supervise the preliminary steps made necessary to the organization of the Company, and to certify that it had conformed to the provisions of the Act, and the latter officers especially, that the charter was in accordance with it, is deserving of consideration. Under the construction thus given, numerous companies have been organized, with charters like the present, providing for cash premiums, or premium notes, at the election of the insured, and an extensive business of insurance carried on in New York and several of the sister States; and, although this practical construction cannot be admitted as controlling, it is not to be overlooked; and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain."

And from *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363, 370:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government whose duty it is to execute it is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly embedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."

In *Dismuke* v. *United States*, decided February 3, 1936, Manuscript Advance Opinions L. Ed., Vol. 80—No. 8, page 375, 379, this Court stated:

> "This has been the administrative ruling since 1920, see Claim of George Taylor Larkin, recorded in 21 P. & R. D. 42. A construction of such long standing is not lightly to be overturned. • • • Later legislation providing for payment of annuities to employees of the United States must be taken to have been adopted in the light of it."

We also quote from the opinion in *Coombe* v. *United States*, 3 F. (2d) 714, 717:

> "• • • The rule that established administrative practice shall be given great weight in determining the meaning of doubtful statutes or regulations is a wise one, and founded on sound principle. The citizen has a right to rely on long-continued administrative practice and on official interpretations which have long determined the manner and method of executing ambiguous laws and regulations. To hold otherwise would leave the citizen at the mercy of new constructions, endangering his business after he had adjusted

himself in good faith to an administrative practice that he had every reason to regard as firmly established."

(4) *There Have Been no Interpretations by the Alabama Supreme Court of the Provisions of the Gasoline Tax Statutes Imposing a Privilege Tax on the Selling or Distribution of Gasoline.*

The only Alabama case cited for appellants as throwing any light on the interpretation by the Courts of Alabama of the gasoline statutes is *State* v. *City of Montgomery*, 228 Ala. 93, 151 So. 856. The attorneys for appellants say that the holding in this case sustains their contention that a storage tax is imposed by the statutes on the gasoline brought into the State and subsequently sold by those dealing in this commodity. We regard the case more as an authority to the contrary.

The State sued the City for gasoline excise taxes. The City filed Plea 3 as follows:

> "• • • defendant purchased the gasoline outside of Alabama, shipped it in tank cars directly into storage tanks of defendant, and that defendant withdrew it from time to time from such storage tanks for use and was used by it in its governmental or municipal purposes and for nothing else."

If the City was liable for the taxes at all, it was on account of gasoline which it had purchased outside the State, shipped in and stored for its own use. None of the gasoline was purchased for resale. All that the Supreme Court had to consider was the liability of the City for taxes on the gasoline handled in this manner. The case was very much of the same character as *N. C. & St. L.* v. *Wallace; Foster & Creighton Company* v. *Graham;* and *American Airways* v. *Wallace, supra,* and what we have stated hereinabove relative to those cases is largely applicable to this

case. The City had the additional defense that as municipalities were not named in the acts as parties subject to the tax, there was no indication of a legislative intent to impose the tax on municipal corporations. The Alabama Supreme Court upheld this contention, but that phase of the case has no material bearing here. The Court distinctly recognized that the 1927, 1931 and 1932 Acts imposed taxes on distributors and retail dealers as well as on storers. We quote some excerpts from the opinion as follows:

> "The act first mentioned, Gen. Acts 1923, p. 36, levies a 2-cent tax on every distributor and retail dealer in gasoline for every gallon sold in this state. It defines a 'distributor' as including any person who shall engage in the selling of gasoline by wholesale in domestic trade, and a 'retail dealer' as including any person who is a distributor who also engages in the sale of gasoline in broken quantities.
>
> "Its provisions therefore do not show that the city is liable for a tax there described.
>
> "The act next mentioned, Gen. Acts 1927, p. 326, amends the first so that the tax is *also* levied upon a storer of gasoline, *in addition* to a distributor and retail dealer, and defines a 'storer' as including any person who ships gasoline into this State in tank quantities and stores and withdraws the same for any purpose.
>
> "The Act of January 25, 1927 (Gen. Acts, 1927, p. 16), is essentially the same as the last above mentioned in levying the tax. Such is also the Act of July 27, 1931 (pages 859, 860), and of November 5, 1932, Ex. Sess. (page 314)." (Emphasis supplied.)
>
> • • • • • • •
>
> "The acts in question impose a tax upon a storer as well as a distributor or retail dealer."

The issue before the court for decision was stated by it in the following language:

"But the facts alleged in plea 3 to the common counts may be held to show that defendant is a storer of gasoline as thus defined, and as counsel seem so to treat it, we will likewise do so."

There was no sale of gasoline involved in the case and no intimation that as to gasoline sold the tax was measured by storage or by withdrawals from storage. Nor was there any mention in the opinion of the provisions appearing in all the statutes providing that where sales are made the tax can be computed on the amount thereof. We think the case holds or at least strongly implies that the Legislature in adopting the 1927 Acts intended to retain the provisions of the 1923 Act imposing taxes based on sales.

The majority of the three judge statutory District Court who sat upon this case below, consisting of two Alabama District Judges, did not construe the opinion in the *City of Montgomery* case as holding that a storage tax was imposed with respect to gasoline which was sold. We quote from the opinion of the District Court as follows:

"The Act manifestly contemplates that the retail dealers and distributors will be engaged in selling gasoline while the storer does not sell it but uses it himself in some way, so that he is taxed not on the sale but on the use of the gasoline he withdraws from storage. This tax must have been imposed to cover those who brought gasoline into the State in large quantities and stored and withdrew it as needed for use to save paying the tax.

"These people do not sell gasoline but use it in their own vehicles or engines.

"This is what the Alabama Supreme Court had before it in the case of *State* v. *City of Montgomery*, 228 Ala. 93, where it is said:

'a tax upon the separate acts of the owner in taking his property out of storage for his own use.'

" 'The acts in question impose a tax upon a storer as well as upon a distributor or dealer.'

"So a storer is one who stores for his own use and not for the purpose of sale, and the tax is levied only where he withdraws the gasoline for his own use" (R. 229, 230).

* * * * * * *

"The case of *State* v. *Montgomery ante; Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249; and *Edelman* v. *Boeing Air Transp.,* 228 U. S. 249, involved only the withdrawal for use and not sales to the Government, and what was said would be applicable only to that feature of the Act. No right is claimed in the instant suit as to gasoline used by complainant.

"It is urged that *State* v. *Montgomery* is a construction of the Act and is binding on this Court, but it did not involve the question here presented" (R. 232).

The Circuit Court of Appeals, Fifth Circuit, in *Pan American Petroleum Corporation* v. *State of Alabama,* 67 F. (2d) 590 (a case which the appellants assert supports their contention as to the construction of the statutes), did not cite *State* v. *City of Montgomery* as holding that the gasoline sold in Alabama is subject to a storage tax. The date of the first decision in the *City of Montgomery* case was June 15, 1933, and the date of the first decision in the *Pan American* case was November 15, 1933. Rehearings were denied in each case.

We respectfully submit that the Attorney General of Alabama and the State Tax Commission were rather late in coming to the conclusion that *State* v. *City of Montgomery* held that the tax levied by the gasoline statutes was on storage with respect to the gasoline sold. As stated above, this case was decided on June 15, 1933, and thereafter on July 14, 1933, the same attorneys who represented the State in that case rendered an opinion to the State Forester that

there was no tax on the gasoline which was sold to the United States (R. 127). Even though it is said for the attorneys that the final rehearing in this case was not passed upon until January 18, 1934, yet approximately a year and a half intervened between that date and the time the Texas Company was notified by telegram that the State was going back for five years (the statutory period of limitation) to collect taxes alleged to be delinquent. It was not stated in the telegram that the claim was on account of gasoline sold by the Company to the Government, but any uncertainty as to the nature of the claim was soon dissipated by the Attorney General's opinion of July 5, 1935.

Not only did the Attorney General fail to change or overrule for a period of eighteen months following the decision in *State* v. *City of Montgomery* the rulings of the previous Attorneys General, but the State Tax Commission during that time continued to give assurances to the Texas Company and the other gasoline dealers that there was no tax liability on account of the gasoline sold to the Government (R. 137-143), and continued to accept the monthly returns showing the taxpayers were not paying any tax on the gasoline so sold. It is, therefore, respectfully submitted that the State officials could not have been very strongly of the opinion, until comparatively recently, that the decision in the *City of Montgomery* case was an authority that the tax could be collected on the gasoline sold to the United States, as in no other way can the inaction and delay in making the claims which are set up by appellants in the case at bar be accounted for.

In *Pan American Petroleum Corporation* v. *State*, 67 F. (2d) 590, the court was called upon to decide whether gasoline delivered to post exchanges located on United States military reservations was taxable under the Alabama gasoline tax statutes. The defendant oil company made two defenses: (1) That as the transactions took place on the

reservations they were handled without the jurisdiction of Alabama; and (2) post exchanges are departments of the United States. The court decided against both of these contentions. According to the opinion, it was contended that the tax accrued under the State statutes "only upon the use within the State of gasoline." That is not what we are contending for in the case at bar, our construction of the acts being that as to gasoline sold the tax accrues at the time of sale and is measured thereby, which is in line with the opinion of the Alabama Attorney General of August 22, 1928 (R. 54), and in line with the interpretation given to the acts by the State Tax Commission for a period of many years (R. 124).

In the opinion in the *Pan American* case, Circuit Judge Bryan, writing for the court, stated that the tax accrues on the gasoline at the time it is withdrawn from storage. The opinion recognizes the principle laid down by this Court in the *Panhandle* case, but states that as post exchanges are voluntary, unincorporated associations in which the members share in the profits and losses, the exchanges are not departments or instrumentalities of the Government and not entitled to tax immunity.

We do not think that if the withdrawal from storage tax applies, it would apply only upon that gasoline *used* in the State. It could also apply to all the gasoline withdrawn whether for use in interstate commerce or for use in other States, except it could not apply as we view it to gasoline sold or withdrawn for sale to purchasers who are exempt from the tax. The statute expressly exempts gasoline shipped in interstate commerce, but, of course, if the statute had imposed purely a storage tax it could have been made to apply to all the gasoline which came to rest in this State, even though such gasoline was subsequently shipped to other States by the persons who originally brought the gasoline into the State.

We respectfully submit the following as to that part of the opinion in the *Pan American* case, which states that the tax is based on withdrawals from storage even when the gasoline is withdrawn for sale and is sold:

(1) This is a holding by an intermediate Federal court giving its interpretation of a State statute not previously construed by the courts of that State, and, therefore, this Court is free to place such interpretation upon the statute as it may conclude is proper, although, of course, giving due weight to the decision of the learned Court of Appeals;

(2) The Circuit Court of Appeals probably did not have the benefit of as many facts as appear in the record in this case showing the history of the opinions of the various Attorneys General of Alabama and the administrative construction placed on the acts for a long period of years by the officials charged with their enforcement. The case was tried on an agreed statement of facts and we assume that the record in the Circuit Court of Appeals upon which the case was submitted is available to this Honorable Court, as it denied a petition for certiorari in the case (291 U. S. 670, 78 L. Ed. 1060);

(3) For aught that appears, the contention we make in this case as to the proper interpretation of the statutes, and we make no claims to infallibility, was not raised in the Circuit Court of Appeals and, therefore, that Court possibly did not consider this manner of interpretation of the statutes. In any event, the *Pan American* case was decided in 1933 and if the State officials thought it afforded a way by which to tax the gasoline sold in Alabama to the Federal Government, they delayed for a considerable time in making claims to this effect. Much of what was said above with respect to what transpired after the decision in the *City of Montgomery* case, *supra*, applies here.

Ervin et al. v. *State of Alabama*, 80 F. (2d) 432, decided after the trial in the District Court of the case at bar, is cited in appellants' brief, page 45. In this case, the taxability of gasoline brought into the State by a common carrier for its own use was involved. None of the gasoline was sold in the State. District Judge Ervin, the same judge who wrote the opinion in the case at bar, held that all of this gasoline except a comparatively small amount was subject to tax. The opinion of the Court of Appeals prepared by Circuit Judge Hutcheson states that it does not appear on what ground the District Judge concluded that a small portion of the gallonage was not taxable. That part of the decree of the District Judge holding that the major part of the gasoline brought into the State and used by the railroad was subject to the tax was affirmed, and the Circuit Court of Appeals also held that all of the gasoline should have been held taxable and that the taxes accruing thereon were secured by a prior lien in favor of the State on the property of the railroad located in Alabama. No taxes with respect to the sale of gasoline were involved. The facts were very similar to those involved in *N. C. & St. L. R. Co.* v. *Wallace; Foster & Creighton Co.* v. *Graham;* and *American Airways* v. *Wallace, supra,* and there is nothing decided in the *Ervin* case as to the taxability of the gasoline there involved with which we take issue.

In view of the situation with respect to the decisions by the Alabama Courts and by the Circuit Court of Appeals, Fifth Circuit, it is respectfully submitted that this Court is free to decide in the light of the information before it the meaning of the statutes in so far as they apply to gasoline sold in Alabama to the Federal Government. It is very earnestly submitted that the facts shown by the record in this case amply support the conclusion that it was the intent of the Legislature in enacting the statutes to impose a tax measured by sales on the gasoline sold in the State.

(5) *As the Gasoline Statutes Tax Gasoline Sold in the State Measured by the Number of Gallons Sold, the Tax Cannot be Collected on the Gasoline Sold by the Texas Company to the United States, as This Would be a Tax on the United States Contrary to the Federal Constitution.*

If we are correct in our views as to the proper interpretation of the Alabama statutes, then it is respectfully submitted that the facts in this case cause it to fall squarely within the scope of the decision of this Court in *Panhandle Oil Company* v. *Mississippi, supra.* See also *Graysburg Oil Company* v. *State of Texas,* 278 U. S. 582, 73 L. Ed. 519, decided by this Court on January 21, 1929. Under these holdings, the State of Alabama cannot collect any tax based on sales by the Texas Company to the United States.

The *Panhandle* case has been many times cited by this Court and other courts since its decision in 1928 and the principles enunciated were applied in the same manner with respect to the right of the United States to collect an excise tax based on sales of motorcycles to a municipality where the article purchased by the municipality was to be used for governmental purposes. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 75 L. Ed. 1277. It is interesting to note that Mr. Justice McReynolds, who dissented in the *Panhandle* case, concurred in the *Indian Motorcycle* case, and that Mr. Justice Holmes, who also dissented in the first case, acquiesced on the ground of *stare decisis* in the second case.

We, of course, recognize that the tax imposed by the Alabama statutes is an excise tax and is not a direct tax on the gasoline. The Alabama tax is the same kind of State tax considered in the *Panhandle* case. The Attorney General of Alabama so recognized it in his opinion of

August 22, 1928 (R. 54-58). We quote again from this opinion as follows:

> "In reply will say that the reasons given in said opinion by the Supreme Court of the United States for the unconstitutionality of the Mississippi law, as applied to sales of gasoline to the United States by a distributor, apply with equal force to the statutes of the State of Alabama, whether the Act of 1923, or that of 1923, as amended Acts, 1927, pages 326, et seq (R. 54).

* * * * * * *

> "It is quite evident, when the reasons given by the United States Supreme Court are considered, that such reasons are as applicable to the Alabama law as to the Mississippi law. When a sale is made by a distributor, retail dealer or storer of gasoline to the United States, whether Alabama or Mississippi no tax can be collected on such sale from either the seller or purchaser, and no tax can be exacted of the seller measured by the number of gallons of gasoline so sold" (R. 57).

It is respectfully submitted that as the tax levied by the Alabama statutes is one based and computed on sales, the tax is unconstitutional and void in so far as it applies to gasoline sold by the Texas Company to the United States in Alabama.

(6) *The Gasoline Delivered by the Independent Service Station Dealers Under Contracts Which the Texas Company had with the United States is not Subject to the Tax.*

The facts as to deliveries to the United States made through independent service stations under contracts which the Texas Company had with the United States are fully set out in the record, pages 118-120, and the type of

such contracts is also fully shown on pages 174-194 of the record.

The Texas Company entered into arrangements with the independent service station dealers handling its gasoline to the effect that if an agent or employee of the United States desired gasoline and could show it was for governmental purposes by producing a Federal exemption certificate, Form 44 (R. 129), or other credentials showing he was authorized to purchase gasoline for the Government, the dealer would let the Government agent or employee have his requirements, taking his receipt therefor, and would then turn in the credentials and receipt to the Texas Company who would at the end of the month bill the department of the United States for whose account the gasoline was purchased under contracts between the Texas Company and the United States and would at the same time enclose the receipts showing the name of the person receiving the gasoline and the amount thereof. The Texas Company has in its files tax exemption certificates, Form 44, which were taken by the independent dealers on each occasion when they delivered gasoline to the Federal agents or employees. After the bills from the Texas Company covering this gasoline were received by the United States, it would in due course pay the Texas Company for the gasoline so delivered. The title to the gasoline originally billed to the dealer passed to him but the Texas Company replaced all gasoline he had delivered to the Government without charge and the dealer was credited and paid an amount equivalent to what he would have made if he had sold the gasoline to third parties. The Texas Company in its monthly reports to the State Tax Commission included in the gasoline it showed as delivered and sold to the United States the quantity of gasoline handled through the independent stations. We think it proper to add that though the State officials prior to June 17, 1935, never made any

claim for taxes on the gasoline sold and delivered by the Texas Company from its own terminal, bulk stations, service stations or from its consigned stocks located in service stations owned by third parties, the officials did from time to time claim that the Company was liable for the taxes on the gasoline delivered in the manner above stated through the independent stations (R. 141-143).

It is evident that this arrangement between the Texas Company and its independent dealers was made so that the independent dealers could make deliveries to the Government under and on account of the contracts which the Texas Company had with the United States, and so that the Government could acquire its gasoline as needed under these contracts at the most accessible service station handling the Texas Company product. There was no procedure provided by the State whereby the United States or the independent dealer or the Texas Company could get any refund of taxes paid on gasoline sold to the Government. (See opinion of Alabama Attorney General to the United States Attorney General, dated November 22, 1928, R. 58, 59). See also letter from State Tax Commission to the Texas Company, dated January 8, 1935 (R. 142), which reads in part as follows:

> "Under the State law, there is no provision for refunds and we can only allow the exemption where the gas is bought from a taxpaying dealer."

If the tax is sustained as to transactions where the dealer does not import his requirements from another State and is held invalid where the dealer receives his stocks from other States and thereafter sells it through his own equipment, then it means that despite the fact that both kinds of dealers may sell the same commodity through the same type of equipment, which may or may not be as accessibly located in some instances as in others, never-

theless the United States must partonize one class of dealers but not the other in order to be immune from the tax on all of its gasoline purchases.

However, the facts in this case are much stronger than if an independent dealer was buying his gasoline within the State and thereafter selling same on his own account to the United States, as here the deliveries were made to the United States under contracts which the Company had with the United States specifying to which Federal departments deliveries would be made. The United States paid the Texas Company directly for the gasoline and all the deliveries were made pursuant to arrangements between the Company and independent dealers under which the independent dealers understood that the deliveries would be made for the Company. If the gasoline which the dealer delivered to the Government had been consigned to the dealer, there could be no possible question but that such gasoline would have occupied the same status as gasoline delivered through the equipment of the Company. Likewise if the Company had "ear-marked" certain gasoline which it delivered to the dealer as destined for delivery under the Government contracts there would seem to be no room for any question. Furthermore, we do not believe there could be any reasonable grounds for contending that gasoline so handled took a different tax status from the gasoline delivered to the United States from facilities owned and operated by the Texas Company.

We respectfully submit that the facts in *Indian Motocycle Company* v. *United States*, decided by the Court of Claims on February 4, 1935, 9 Fed. Supp. 608, cert. den. by this Court October 4, 1935, — U. S. —, Vol. 80, Advance Sheets, U. S. L. Ed. No. 1, page 11, 56 Sup. Ct. 116, presented a stronger case for the liability of a tax claimed by the United States on the transactions there involved than the facts set out in this record do with respect to liability for

the taxes here claimed by the State. The tax claimed by the Government from a manufacturer in the *Motorcycle* case was based on a Federal statute imposing excise taxes on the sale of motorcycles. Some of the motorcycles had been sold by a manufacturer to a dealer who in turn sold them to a municipality for governmental purposes. The facts were stipulated in the case and we quote one of the stipulations as follows:

> "In this type of transaction, delivery was always made by the manufacturer to the dealer or on dealer's order, and the dealer made payment to the manufacturer. The method pursued by the manufacturer in delivering, billing, and accounting in such cases was not different from its method in ordinary sales to dealers."

The Court of Claims in its opinion held that transactions of this character were not subject to the tax, the opinion reading in part as follows:

> "There is no substantial distinction between sales made by the plaintiff to a city on an order received from it, and sales made through the order of an independent dealer in the manner stated. The two transactions are the same in substance. The *direct tax burden on the city purchasing the vehicle is exactly the same in each case, it paying the entire tax.* The plaintiff in each case receives the same amount for the article sold, the profit to the independent dealer is the same, and the sales price to the municipality, including the tax, is precisely the same. The plaintiff on the receipt of an order for a vehicle, whether the order comes directly from the city or a local dealer, knows that it is being purchased by the city for use in the performance of essential governmental functions, and in each case makes special markings on the vehicle to indicate its use. In view of these facts, which have been stipulated by the parties and are not in dispute,

the sales in question fall within the decision of the court in *Indian Motorcycle Co.* v. *United States, supra,* and are exempt from the tax." (Emphasis supplied.)

Referring generally to this part of the discussion, we also call attention to *Norfolk National Bank* v. *Commissioner of Internal Revenue,* 66 F. (2d) 48, decided by the Circuit Court of Appeals, Fourth Circuit, on June 15, 1933.

The tax levied by the Alabama statutes is in its essence a tax on the consumer. The tax from the time it attaches is a concomitant of the gasoline and becomes indissolubly connected with it in the same form and to the same extent as imposed by the statutes. What possible difference can it make to the consumer whether the gasoline is sold once or twice in Alabama before it reaches him? The gasoline is only used as a measure of the tax one time and the tax burden to the consumer is the same regardless of the number of times it is sold in the State before it is purchased by him.

The statutes in a number of States allow refunds direct to the consumer where he uses gasoline for purposes other than motor fuel. The refund statutes in these States make no distinction as to whether the gasoline is sold one or more times before it reaches the consumer. (See Exhibit C to Appendix to this brief.)

(7) *An Excise Tax Measured by the Number of Gallons of Gasoline Withdrawn From Storage For Sale and Delivery to the United States is a Tax on the United States.*

Without waiving our insistence in the foregoing portion of this brief that the Alabama gasoline tax is based on sales where the gasoline is sold, we respectfully submit that a tax based on withdrawals of gasoline for sale or delivery to the United States is the same in substance and legal effect as a tax based on the sales of such commodity. There is no practical distinction between the two taxes, as the

amount of the tax is based on the same gasoline, is calculated on the same number of gallons, remitted by the same taxpayer and the tax burden inevitably falls on the purchaser in the same manner. The point for decision is not merely a question of by what nomenclature the tax is designated, but what its real operation and effect is. The character of a tax cannot be changed by merely changing its name.

It is contended by counsel for appellants that the tax which applies to the gasoline involved in this case is one upon the privilege of storing measured by the amount withdrawn from storage (appellants' brief, page 33). The tax never accrues until the gasoline is withdrawn from storage, and the tax is measured solely by the amount so withdrawn. The Attorney General of Alabama in his opinion of July 5, 1935, [illegible]e nature of the tax as interpreted by him in the following language:

> "* * * it is my opinion that the tax imposed by the several acts accrues upon and at the time of withdrawal from storage, and whether the withdrawal is actually made for wholesale or retail trade or for other use is immaterial."

In the opinion of the Alabama Supreme Court in *State* v. *City of Montgomery, supra,* the tax applying to the gasoline which is subject to the storage or withdrawal from storage tax is defined as follows:

> "The acts in question impose a tax upon a storer as well as a distributor or retail dealer. We think this is true though it is not due until it is withdrawn from storage, and is measured by the amount so withdrawn rather than the amount placed in storage. True, it may leak and waste out of storage, or explode, and thereby and to that extent no tax is payable; but the whole of the acts taken together show, we think, that

> the purpose is to impose the tax on the storage, though measured by the amount withdrawn, and then it becomes due to be paid."

In the agreed statement of facts, it is stated that it has been the uniform practice of the State Tax Commission to compute the tax on the gasoline either sold or withdrawn from storage as follows: As to the gasoline sold or intended for sale, no tax was computed or paid until the title thereto passed to the purchaser, and as to the gasoline withdrawn for use other than for sale, no tax was computed or paid until such gasoline was actually withdrawn for such other use (R. 124).

In the light of these interpretations, it is earnestly submitted that the tax is not one on *storage* but is one on the privilege of *withdrawing from storage for use*. The conclusion of the District Court as to this phase of the case is stated in its opinion as follows:

> "The Act and the practice of the state has been where gasoline was withdrawn from one place of storage and placed in another no tax was imposed, yet here was a withdrawal from storage, but the purpose was not to use it or sell it, so again it was the use for which the withdrawal was made that determined whether the tax was imposed.
>
> "Suppose a man builds a large tank and stores gasoline for others at a price, he never sells or uses it, they withdraw it and place it in their filling stations for sale. He is in the business of storing gasoline, but he would pay no tax.
>
> "Or, if one figured the price would go up and he bought and stored gasoline in large quantities during a period of more than a year, he would pay no tax for that year. So we see the tax is not levied on the storage but on the use for which it is withdrawn" (R. 230).

If there is no liability for the tax on gasoline which is originally stored but subsequently leaks and wastes out of

storage or explodes, how can the tax be said to be one on the privilege of storing? If gasoline is stored for one, five or ten years, there is no tax liability unless it is withdrawn from storage. If a person stores gasoline in the State for a long period of years and then sells it in place to another party the person originally storing never becomes liable for any tax though he has clearly exercised the privilege purportedly taxed. It seems to us an anomaly to say that a tax is based on the storage of gasoline where the amount of the tax is measured only by the quantity of gasoline withdrawn from storage for use and does not accrue until such withdrawal takes place.

This Court has many times said that in considering the nature of a tax it is not bound by the definition as found in the act and that where it is passing on the effect of an act under the Federal Constitution, it is not bound by the characterization of it by the State Court. We quote from the opinion prepared by Mr. Justice Roberts in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054 as follows:

> "In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect. 'The substance and not the shadow determines the validity of the exercise of the power.' "

We also quote from the opinion prepared by Mr. Justice Holmes in *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 67 L. Ed. 297:

> "But this court, although bound by the construction that the Supreme Court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect."

The attorneys for appellants contend that the District Court erred in stating in its opinion that all of the acts

adopted during the period from 1927 through 1935 contained the same verbiage so that the construction of one of the acts applied to all of them (appellants' brief, pages 34 and 35). All of the acts adopted subsequent to the 1923 Act, except the act last adopted in 1935, imposed a tax of a designated amount per gallon "upon the selling, distributing or withdrawing from storage for any use gasoline" (R. 4, 22, 27, 32 and 38). The last 1935 Act imposed a tax of six cents per gallon upon "the selling, distributing, storing or withdrawing from storage in this State for any use gasoline." The attorneys for appellants contend that the gasoline sold by the Texas Company to the United States during the period the acts adopted prior to the last 1935 Act were in effect was subject to a storage tax under such prior acts. They assert that this construction is supported by the language of the Alabama Supreme Court in *State* v. *City of Montgomery, supra.* If a storage tax was levied by the acts in effect previous to the effective date of the last 1935 Act, how can the addition of the word "storing" in the act last mentioned change the character of this act from the acts previously in effect? This addition would merely be surplusage. In view of the affidavit of the Secretary of State (R. 105), it is submitted that there can be no basis for a finding that the Alabama Legislature in adopting the last 1935 Act was influenced by the Attorney General's opinion of July 5, 1935. There is no mention made in the dissenting opinion of Circuit Judge Hutcheson that there was any distinction between the last 1935 Act and the acts previously in effect.

We earnestly submit that if the acts adopted from the period from 1927 to the first half of 1935 did not impose a tax on storage but imposed a tax for the privilege of withdrawing from storage for use, then the last 1935 Act likewise does not impose a storage tax, for the reason that

this Act does not require any taxpayer to make a return or pay any tax on account of the gasoline stored by him. The taxpayers were required under the 1935 Act, as they were required under the previous acts, to make a report only of "all sales and withdrawals of gasoline made by them" during the next preceding calendar month. We quote Schedule 156.3 of the last 1935 Act:

> "On or before the twentieth day of each month after this Chapter shall have taken effect, every person upon whom this excise tax is levied, shall render to the State Tax Commission on forms prescribed by such Commission, a true and correct statement of *all sales and withdrawals of gasoline* made by him or them during the next preceding calendar month, and shall furnish the said Commission such other information as such Commission may demand and/or require, upon blanks to be formulated and furnished by said Commission, and at the time of making such monthly report shall pay to the State Tax Commission an amount of money equal to the excise tax herein levied." (Emphasis supplied.)

The taxpayers under the 1935 Act are not even required to keep a record of the gasoline stored by them. We quote Schedule 156.5 of this Act:

> "All distributors, refiners, storers or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office, such books, documents or other papers as will clearly show the *amount of sales, distributions or withdrawals of gasoline* made in this State covered by this Chapter." (Emphasis supplied.)

In Schedule 156.14 of the last 1935 Act, which relates to delinquencies in payment of the tax, no mention is made of failure to pay any tax on account of storage. We quote:

> "If any distributor, refiner, storer or retail dealer in gasoline covered by this Chapter shall fail to make the monthly returns prescribed herein and pay the ex-

cise tax hereby laid, on or before the 20th day of the month following sale, distribution or withdrawal, the State Tax Commission shall make return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return and pay the tax herein levied of twenty-five per cent (25%) of the tax due, to the amount as assessed by the Commission."

If there is no provision made in a statute levying a tax or in any other statute specifying the time or manner in which the tax shall be paid, then there is no valid or enforceable tax. It is clear that there are no provisions in the last 1935 statute which could possibly indicate that a tax accrued on storage as such. Of course, if the tax accrues at the time of withdrawal from storage for use and is measured by the amount withdrawn, then the tax is in substance and legal effect a tax based on the withdrawal from storage for use and is not a tax for the privilege of storing.

For the sake of argument, let it be assumed that the statutes levy a tax based on the privilege of storage and that each of two persons store the same quantity of gasoline in the same kind of containers and under like conditions, one storing his own gasoline and the other storing in his own equipment for a consideration gasoline of third parties, and at the end of a year the party storing his own gasoline withdraws same for use and simultaneously the gasoline stored by the other party explodes and is destroyed. Each person has exercised the same privilege of storing under identical conditions, except one owns his own gasoline and the other stores gasoline, the title to which is in third parties. Would it not be violative of the equal protection or due process clauses of the Constitution to exact the storage tax from the person who withdrew his gasoline from storage for use and not exact the tax from the other? If the tax is for the withdrawal from storage for use, then it is obviously proper to

collect from the party withdrawing for use and not from the other, as the latter never exercised the privilege taxed. As we view it, this Court demonstrated in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 65 L. Ed. 638, that a storage tax of the kind that attorneys for appellants contend is levied by the Alabama statutes could not be upheld. We quote from the opinion of Mr. Justice Brandeis:

> "The name by which the tax is described in the statute is, of course, immaterial. * * * Nor is the alleged business of merely owning and storing whisky in bond made taxable. So long as the whisky is stored in bond within the state, it is free of the tax. One may own and store the whisky for years in the hope of selling it at a profit, and yet be free from any obligation ever to pay this tax, if, before its removal from bond within the state, the whisky is sold to another, or if, while so owned, it is destroyed or forfeited to the government."

The distinction between a storage tax and a tax such as the tax levied by the Alabama statutes, which the attorneys for appellants contend is a storage tax, is well stated by the Supreme Court of Florida in *Sheip* v. *Amos*, 100 Fla. 863, 130 So. 699. We quote from the opinion as follows:

> "The essential difference between the Kentucky tax and the tax now under consideration is that the present act of storing the commodity, which is a species of 'use', and not its future withdrawal, which is merely a change in the form of possession not amounting to a taxable 'use', is made the criterion of our tax.
>
> * * * * * * *
>
> "Primarily, liability for the tax arises by reason of the present act of storage, a species of use. Liability for the tax is not dependent upon the future and uncertain act of withdrawal, a mere change in the form of possession, as in the *Kentucky Distilleries* Case,

supra, nor is it a tax upon consumption, although it is applicable only to the storage of gasoline 'to be used and consumed' in this State."

In *Gregg Dyeing Company* v. *Query,* 286 U. S. 472, 76 L. Ed. 1232, this Court considered a tax enacted by the State of South Carolina, which was a valid tax for the privilege of storing gasoline in that State. The tax there attached to gasoline brought from another state after it had been kept in storage for a period of twenty-four hours or more following its loss of interstate character as a shipment in interstate commerce. The tax only applied to gasoline intended to be stored or used for consumption in the State. While all of the sections of the act are not set out in the opinion, we assume all of this gasoline was required to be reported and the tax paid thereon by the 20th of the next succeeding month after its arrival in the State. (Such a provision as to reporting a payment of the tax appears in Section 2512 of the Civil Code of South Carolina of 1932). There can be no doubt but that this statute imposed a valid tax based on the privilege of storing and unlike the Alabama acts the time of the accrual of the tax is clearly fixed and the measure of the tax clearly determined by the quantity of gasoline stored.

It is, therefore, respectfully submitted that the District Court properly concluded that all the statutes enacted subsequent to 1927 were the same kind as those enacted in 1927 and that all should be treated in the same manner.

(8) *An Excise Tax Measured by the Number of Gallons Withdrawn From Storage for Sale and Delivery to the United States Imposes a Tax Burden on the United States in the Same Manner as Does an Excise Tax Measured by the Amount Sold.*

Due to the volatile and inflammable qualities of gasoline, it is required to be stored in closed metal containers. In

the agreed statement of facts, it is stipulated that when gasoline of the seller is stored in tanks or containers in Alabama, before it can be delivered into storage tanks or containers or in the fuel tanks of the vehicles of the purchasers, it is first necessary to withdraw such gasoline from storage from the tanks or containers of the seller (R. 125). Of course, the seller could bring the gasoline into the State in metal barrels or drums and then sell and deliver the article to the purchasers in the original containers, but the seller is taking such gasoline from his warehouses or storage depots located in the State for delivery to the purchasers would still be withdrawing the gasoline from storage. See *Ervin* v. *State of Alabama, supra.*

The gasoline could be delivered to the Government in interstate commerce, it taking title before or at the time the gasoline reaches its destination, and the gasoline could then be stored by the United States in its own tanks or containers. This procedure was suggested by appellants in the answer that they filed in the District Court (R. 87). Again the gasoline after its storage by the seller in Alabama could be sold to the Government in place and the Government could then withdraw it from storage. Of course, if the Government receives its gasoline in interstate commerce, such gasoline would clearly be exempt from tax and when the Government withdrew such gasoline for its own purposes, it would not have to pay any tax, as it would be the only one liable for the reporting and payment of the tax. Under the interpretation of the attorneys for appellants, however, if the gasoline is sold to the Government in place in the tanks or containers of the seller, the seller would still be liable for a tax on account thereof but for the holding in the *Panhandle* case, as the attorneys contend the purpose of the tax on gasoline for the privilege of selling only applies when the gasoline has in some manner escaped the storage tax (R. 59).

We readily admit that the United States could set up its own storage tanks into which its gasoline could be shipped in interstate commerce and from such storage tanks deliver the gasoline direct to its agents or employees needing same to carry on the Government's business and it could in addition also buy or build and own and operate its own tanks and pumps in the cities, villages, hamlets and other points in the State from which small deliveries could be made into the vehicles of its agents and employees as needed by them in the carrying on of their duties in the various parts of the State. Such a system of handling gasoline in the State would clearly exempt the Government from the burden of the tax on the gasoline used by it in Alabama and the equipment and other property owned and used by the Government would be exempt from *ad valorem* and other forms of State taxation. But would not the Government in this situation be availing itself more of the facilities and protection furnished by the State without paying any tax therefor than it would if it bought its requirements from dealers who paid all *ad valorem*, license, and other taxes levied by the State and the various subdivisions thereof, except the gallonage taxes on the gasoline sold to the United States?

This Court has not yet laid down the doctrine that the United States by using the machinery or facilities of the State is subject to a tax on account thereof. See *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 703, where this Court in a unanimous opinion prepared by Mr. Justice Holmes held that the State of Alabama could not collect a privilege tax for recording mortgages owned by a Federal Land Bank, even though the facilities for the recording of the mortgages were furnished by the State. Of course, the functions carried on by the United States in a state in most

instances inure to the benefit of the citizens of the state or to the citizens there located, as well as to the citizens in other states, and this applies to the functions carried on by the United States in each state. The citizens of a state are as much citizens of the United States and they contribute in the form of taxation and otherwise to the carrying on of both governments. It therefore follows that when a state foregoes taxing the Federal Government on account of the operations carried on therein, whether by reason of constitutional prohibition or otherwise, the citizens of the state who contribute to the cost of the Federal Government as well as to the operation of their state government, are not caused to suffer loss.

If a tax based on the number of gallons sold to the United States is a tax on the United States, a tax based on withdrawals from storage for sale to the United States is likewise a burden on the United States. The act of withdrawing gasoline from storage for sale is a necessary ingredient in the consummation of the sale where the delivery of the gasoline is from the containers of the seller into the containers of the buyer. To tax an essential element of a transaction is to tax the whole transaction. In the opinion in the *Panhandle* case prepared by Mr. Justice Butler, it is stated:

> "To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."

We respectfully submit that the above sentence could be paraphrased as follows and the conclusion would be equally true:

> "To use the number of gallons withdrawn from storage for sale to the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."

It is now well recognized both in the courts and by the legislatures in many states that excise taxes levied by the states on the selling, distributing, withdrawing from storage, storing or use of gasoline measured by the quantity of gallons so employed, are taxes the burden of which is borne by the consumer. They are of such character that they are directly passed on where the commodity is sold. There are many taxes included in the price at which an article is sold that are not capable of exact separation or identification and the extent to which these taxes are reflected in the cost to the purchaser cannot be tangibly pointed out or allocated with even approximate exactitude or certainty. However, the gallonage taxes of the kind considered here are definitely identified and the seller in fixing the price of the gasoline separately adds them and passes them on to the purchaser in exactly the same form in which they are imposed.

In *Jefferson County* v. *Hard*, 227 Ala. 201, 149 So. 81, decided in 1933, the Alabama Supreme Court stated for the purpose of the decision that the gasoline statutes then in effect in Alabama were taxes passed on and borne by the consumer. We quote from the opinion as follows:

> "We note the following averment in the petition for mandamus: 'Petitioner avers that the gasoline purchasers in Jefferson County have paid into said fund for gasoline purchased by them in Jefferson County an amount greatly in excess of the amount which Jefferson County receives under the disbursement of said funds.'
>
> "Taking this as true on demurrer, and assuming that the taxes, wherever paid, are passed on to the consumer, and should be treated as paid where the consumer buys the gas, we observe that one of the bases on which excise taxes on motor fuels are levied for highway purposes is the benefit derived by the purchaser from good roads constructed and maintained by the tax he pays.

"Now this beneficial use has no relation to county boundaries. Purchasers of gas in one county may use it on the roads in many counties, or even beyond state lines; neither are the purchasers, the taxpayers, under above averment, confined to the citizens of the county where purchased."

In *Gregg Dyeing Company* v. *Query, supra,* this Court considered a contention by the taxpayer that as it had to pay an excise tax of six cents per gallon based on the storage of all gasoline brought into the State of South Carolina and used by it, and as no tax was levied for a like privilege on parties buying their requirements within the State, the complaining taxpayer was unconstitutionally discriminated against. In the opinion prepared by Mr. Chief Justice Hughes, it is pointed out that the party purchasing the gasoline in the State had paid precisely the same amount of tax on its gasoline because the seller of the gasoline in the State had to pay a tax of six cents per gallon for the privilege of selling same, which tax the purchaser paid when he bought from the seller. We quote from the opinion as follows:

"Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. *Texas Co.* v. *Brown* (258 U. S. 479, 66 L. Ed. 727, 42 S. Ct. 375) *supra; Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 222, 72 L. Ed. 857, 858, 56 A. L. R. 583, 48 S. Ct. 451; *Indian Motorcycle Co.* v. *United States,* 283 U. S. 578, 579, 75 L. Ed. 1282, 1283, 51 S. Ct. 601. So far as dealers in gasoline within the State are concerned, there appears to be no ground for appellants' claim of discrimination. The point with respect to appellants is that they are not dealers but users, consumers of gasoline in their business. They are required to pay the

tax with respect to the gasoline they keep for such use and consumption within the State. As to such gasoline, they pay precisely the same amount per gallon as other consumers within the State are in effect required to pay through the tax on the dealers from whom such consumers buy."

The opinion in this case was unanimous. We respectfully submit that this Court would most probably have reached the same conclusion if the tax the State distributors had to pay on the gasoline handled by them was a tax for the privilege of storing instead of a tax for the privilege of selling.

In *Monamotor Oil Company* v. *Johnson*, 292 U. S. 85, 78 L. Ed. 1141, this Court considered a statute of the State of Iowa which levied a tax of two cents per gallon, later raised to three cents, on all motor vehicle fuel "used or otherwise disposed of in this State for any purpose whatsoever." In the opinion prepared by Mr. Justice Roberts, attention was called to the fact that the distributor liable for the reporting of the gasoline and payment of the tax was required by statute to pass it on to the consumers. It was further stated that the consumers or purchasers were allowed a refund on all gasoline used by them for purposes other than the propulsion of motor vehicles. This Court considered the tax as purely one on the consumer. We quote excerpts from the opinion as follows:

"The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the State. To prevent evasion the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; but as some purchasers employ the gasoline for a purpose other than the propulsion of a motor vehicle, and as the burden of the tax has been passed on to them as well as those who de-

sire a motor fuel, provision is made for a refund to the former."

"The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does. It cannot therefore be said that any tax is laid upon the appellant in case of another class of taxpayers."

The fact that the Iowa statute expressly required the distributor to pass on the tax to the consumer no more in our opinion effectively proves that the tax is on the consumer than where such a requirement is not incorporated in mandatory form in statutes levying taxes of this kind. The price at which distributors or others may sell their gasoline is not subject to regulation by the State (*Williams* v. *Standard Oil Company*, 278 U. S. 235, 73 L. Ed. 287), although we suppose if they sold it at all in States which had statutes like the Iowa statute, they would have to sell it at a price at least equivalent to the State tax. However, when a seller of gasoline sells his product at a net loss to him, how can it be said that he is absorbing the State tax or a portion thereof any more than it can be said that he is taking the loss with respect to some elements exclusive of taxes which enter into the cost? The only practical effect we can conceive of a statute containing provisions like those in the Iowa one, to the effect that the tax must be passed on to the consumer, is that it is a legislative recognition that taxes of this character should be borne directly by the consumer.

The legislatures in a number of States allow the consumers of gasoline refunds of gasoline excise taxes levied by them where the gasoline is not to be used in the propulsion of motor vehicles, notwithstanding the statutes levying

the tax require distributors to collect, report and pay the tax in the first instance. For example, in the State of Oregon, dealers are required to render a statement monthly of all motor fuel used, sold or distributed by them (Oregon Laws 1933, ch. 428, Sec. 5). Where the gasoline is used by purchasers other than as motor fuel on the highways of the State, the purchasers thereof are allowed direct refunds of the tax. We quote:

> "Any person, firm or corporation who shall buy and use any motor vehicle fuel as defined in this Act for the purpose of operating or propelling stationary gas engines, tractors, motor boats, or who shall purchase or use any of such fuel for cleaning or dyeing or other commercial use of the same, except in motor vehicles operated or licensed to be operated upon any of the public highways of the State of Oregon, or who shall purchase and export the same for use outside this state, and who shall have paid any tax on motor vehicle fuel levied or directed to be paid, as provided by this Act, either directly by the collection of such tax by the vendor from such consumer, or indirectly by adding the amount of such tax to the price of such fuel and paid by such consumer, shall be reimbursed and repaid the amount of said tax paid by him," etc. (Oregon Laws 1935, ch. 403.)

In 1935, the State of Delaware levied a tax of four cents per gallon on motor fuels sold and delivered or used in the State. One of the paragraphs in the preamble to the act reads as follows:

> "Whereas, it is found that the practicable effect of the levying of a tax on motor fuels sold by the distributors is that the tax is in fact collected from the consumer, by being added to the price of such fuel, and the burden of the tax paid by the distributor is passed on to and paid and borne by such ultimate consumer, and accordingly, that the consumer who uses such mo-

tor fuel in motor vehicles and for the operation thereof is in practical effect paying a license fee and tax upon the motor vehicle itself;'' (Senate Bill 122, Approved April 18, 1935.)

Paragraph (b) of Section 16 of the act makes provision for refund of any tax paid on gasoline not used in motor vehicles. Paragraph (e) of Section 6 of the Act, as do the acts in many other States, expressly exempts motor fuel used by the United States or any of its agencies.

A brief statement of the substance of the laws in the other States levying gasoline taxes of the same general character as those involved in the present suit are set out in Exhibit C of the Appendix to this brief. Only those features of the laws which we think might be informative or helpful in considering the issues involved in this case are mentioned.

The affidavit of F. L. Tosch, Chief Accountant for the Texas Company at its district office in Atlanta, Georgia, states that the average profit his company made on the gasoline sold and delivered in Alabama to the United States was less than one cent per gallon. It is further stated if the Texas Company has to pay the State excise tax with respect to the gasoline withdrawn from storage for sale and delivery to the United States, it will in the future add to the price at which it sells or attempts to sell such gasoline the amount of the excise taxes in effect at the time such sales or attempts to sell are made (R. 97). See also affidavits of representatives of other oil companies which state the method employed by such companies with respect to the gasoline sold in Alabama by these companies to the United States (R. 98-105).

The contract dated June 21, 1934, covering deliveries from the Mobile terminal of the Texas Company to the War Department at Fort McClellan during the period from July 1, 1934, to September 30, 1934, specified a price of

$.07718 per gallon (R. 149). The price under the contract providing for shipments from the Mobile terminal to the War Department, Fort McClellan and Maxwell Field and to the Tennessee Valley Authority, Wilson Dam, during the last three months of 1935 specified a price of around $.09 per gallon where the gasoline was delivered FOB destination and a price of $.07 per gallon for deliveries FOB Mobile (R. 214). At price levels like these which necessarily include the cost of refining and shipment from Port Arthur, Texas, handling charges and many other items such as *ad valorem* taxes on its property, equipment, etc., it is not reasonable to suppose the Texas Company could or would absorb an additional tax of six cents per gallon.

Where deliveries are made by the Texas Company from bulk stations or service stations, the prices charged the United States are higher (R. 167-194), on account of the additional handling charges and other services involved in making the deliveries at points other than at the terminal.

It can scarcely be assumed that the United States expects or desires that parties selling to it gasoline shall do so at a loss by absorbing taxes of this nature. We respectfully submit that it can be reasonably concluded from the facts in this record that if the tax attaches to the gasoline sold to the Government, the price to the Government will be increased accordingly. In this connection we quote from the opinion in the *Panhandle* case as follows:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons."

Conceding that one of the taxes levied under the Alabama statutes might be classified as a valid one on storage, and we make this concession without desiring to waive anything we have hereinabove contended to the effect that there is not such a tax levied, the tax burden would fall in the same manner on the Government as where the gasoline is measured by the amount sold. As we understand the decisions of this Court, any tax which directly and immediately falls on the Government is forbidden unless the Government waives its immunity. It matters not under what guise an excise tax is levied nominally on a party transacting business with the Government, if one of the necessary operations to carry on or conclude the transaction is taxed in such manner as that the tax will be passed on in the same form and extent to the Government, then it is a tax on the Government. In considering the nature of the privileges taxed under the Alabama statutes, the comprehensive plan or purpose in enacting the statutes must be considered. It is without question under the holding in the *Panhandle* case that the tax levied on selling gasoline is a direct tax on the purchaser. The other privileges purported to be taxed are levied under the same comprehensive scheme and a like interpretation should be placed on them. The whole machinery as to the levy, computation and collection of the tax is all pursuant to one common end. All of the taxes levied by the statutes are designed to fall immediately and in the same form on the purchasers or ultimate consumers of the gasoline.

It is very significant, we think, that although all or practically all of the states have in effect taxes on those dealing in gasoline measured by the amount sold, distributed, stored, withdrawn from storage or used, there have not been cases, which have come to our knowledge, prior to the one at bar since the decision in the *Panhandle* case,

in which claim was made by a state that if it could not levy taxes for the privilege of selling gasoline to the Government measured by the amount thereof, such gasoline could be made to bear a tax under the guise of denominating it a tax on storage or withdrawal from storage. The State of Tennessee under its statutes, which attorneys for appellants contend are so similar to the ones in effect in Alabama, has never, according to our information, contended that gasoline sold in that State to the United States could be used as a measure of any tax imposed by its laws. While the universal recognition by the states that their statutes imposing taxes of the same general character as those imposed by the Alabama statutes do not levy a tax on the gasoline which is sold to the United States does not prove that such a tax cannot be collected, it does strongly indicate, we respectfully submit, the construction of such statutes by the other states.

It does not seem to us to be in accord with established legal principles that when statutes have been administered in one manner for a long period of time, and in the light of these interpretations the Legislature reenacts the same statutes from time to time, that then the State can successfully maintain that the effect of the statutes has been entirely misconceived and that the statutes mean something entirely different. We are reminded by the contention of the appellants in this case of what this Court said in the recent case of *Lee* v. *Bickell,* 292 U. S. 415, 78 L. Ed. 1337, with reference to the contentions of some of the officials of the State of Florida. We quote from the opinion prepared by Mr. Justice Cardozo:

> "Finally in Florida itself, the very statute now in controversy was ruled by the appellant's predecessor in the office of Comptroller to be inapplicable to these transactions or to others not to be distinguished. Counsel for the appellees, uncertain as to his clients'

duty, put the case to the Comptroller, and received a favorable ruling. For nearly two years the statute was so administered till the present appellant, reaching out, it seems, for new sources of public revenue, found or thought he had found the evidence of an intention to tax a copy made in Florida of a memorandum in New York.

* * * * * * *

"The directive force of all these signposts of intention is little less than irresistible when the series is viewed together. The meaning ascribed to the statute by the judges of the court below gives it coherence and simplicity. The meaning read into it by the Comptroller splits it into jarring fragments, one a plan for the taxation of the operative documents, all executed in one place, and the other a plan for the taxation of casual reports and copies, executed in another. These plans, to be sure, might be held to coexist if the purpose to combine them were unmistakably disclosed, yet disclosure short of that would be too weak to make the combination plausible. The Florida decisions tell us that doubts, if nicely balanced, will be resolved in favor of the taxpayer."

As we interpret the decisions of this Court, the controlling features in determining whether an excise tax nominally imposed on those who do business with the United States is not whether a tax is laid on a sale or measured by it, but whether the tax directly falls on the United States no matter under what guise or form the tax may be levied.

Western Union Telegraph Co. v. *State of Texas,* 105 U. S. 460, 26 L. Ed. 1067;

Williams v. *Talladega,* 226 U. S. 404, 57 L. Ed. 275.

Attorneys for appellants cite *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 77 L. Ed. 1155, and *N. C. & St.*

L. R. Co. v. *Wallace, supra,* in support of their contentions. These cases involved taxes on gasoline to be used in interstate commerce operations. The controlling principles as to when a tax is a burden on interstate commerce are different from those applying to the immunity of the United States from taxation. We quote from the opinion prepared by Mr. Justice Holmes in *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. Ed. 126:

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer (for the cases in this field). They deal with the conduct of private persons in matters in which the states as well as the general government have an interest, and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. *Farmers & M. Sav. Bank* v. *Minnesota,* 232 U. S. 516, 525, 526, 58 L. Ed. 706, 711, 34 Sup. Ct. Rep. 354."

The recognition of the distinction is further stated in the opinion of Mr. Justice Holmes in *Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. Ed. 338, as follows:

> "The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 41 L.

Ed. 833, 17 Sup. Ct. Rep. 418; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616, 47 L. Ed. 328, 332, 23 Sup. Ct. Rep. 206. The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. *Williams* v. *Talladega*, 226 U. S. 404, 416, 417, 419, 57 L. Ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland*, 254 U. S. 51, 55."

This distinction was again pointed out in the opinion written by Mr. Justice McReynolds in *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 72 L. Ed. 202.

The immunity of the United States from state taxation is absolute except where waived by it.

Clallam County v. *United States*, 263 U. S. 341, 68 L. Ed. 328.

(9) *The State is Not Now in Position to Claim that the Texas Company is Liable for Taxes on the Gasoline Which Was Sold and Delivered By It to the United States During the Past Five Years.*

It is uncontroverted that the Texas Company did not include the State taxes with respect to the gasoline it sold to the Government since the middle of 1928. The record shows the Company was solicitous to comply with the laws of Alabama relative to this gasoline: It in good faith followed the rulings of the Attorneys General of Alabama and the interpretation of the statutes as it from time to time was advised by the State Tax Commission in response to its inquiries (R. 137-144). The only point of difference between the Company and the State Tax Commission was as to the gasoline delivered to the United States through the independent service stations. We do not contend that the Company is in the same position with respect to the gasoline delivered pursuant to commitments entered into

subsequent to July 5, 1935, the date of the last opinion of the Attorney General, in so far as the doctrine of estoppel applies. The official opinions of the Attorneys General of Alabama protect the tax officials of that State when the latter follow such rulings. (Exhibit D of the Appendix of this brief.) The taxpayer should be equally protected where he places the same reliance on the rulings that the State officials are entitled to place thereon.

The State should be required to follow just as strictly the rule of good faith and fair dealings in its relation with the people subject to its laws as the State requires such persons to follow in their transactions with it. It is difficult to conceive of a stronger case for the application of this principle than is shown by the facts appearing in the record in this case. We quote from the opinion of District Judge Gresham in *Indiana* v. *Milk,* 11 F. 389, 397, as follows:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel. *Com.* v. *Andre,* 3 Pick. 224; *Com.* v. *Pejepscut Proprietors,* 10 Mass. 155; *People* v. *Soc. for Prop. of Gosp.,* 2 Paine, 545; *State* v. *Bailey,* 19 Ind. 452; *People* v. *Maynard,* 15 Mich. 463; *Cahn* v. *Barnes,* 5 Fed. Rep. 326."

See also:

Walker v. *U. S.,* 139 Fed. 409 (affirmed C. C. A., 5th, 148 Fed. 1092 Mem.);

Curen v. *New York,* 79 N. Y. 511 (reversing 7 Daly, 544);

Philadelphia v. *Anderson,* 142 Pa. 357, 21 Atl. 976, 12 L. R. A. 751;

United States v. *Stinson,* 125 Fed. 907, affd. 49 L. Ed. 724;

United States v. *Willamette,* 54 Fed. 807, 811.

Conclusion.

The issues involved in this case are important to the United States, the State of Alabama, the Texas Company and to the persons and other companies selling gasoline to the United States. If the State can collect taxes with respect to the gasoline sold to the United States, so can certain of its counties now levying taxes of from one to three cents per gallon and so can its municipalities now levying taxes of from one to two cents per gallon (R. 97). The lubricating oils and greases sold to the Government will likewise bear a tax imposed under a State statute very similar in form to the gasoline statutes (R. 145). If gasoline sold in Alabama to the United States is taxable, so will the gasoline sold in other states be taxable, either under the statutes presently in effect or susceptible to easy amendment.

Where the line of governmental immunity is drawn in this case, it will apply alike to the United States and to the States. *Indian Motocycle Company* v. *United States, supra.* If the State can levy a gallonage tax with respect to the gasoline sold to the United States, the United States can also levy a tax with respect to the gasoline purchased by the states. Assuming the levy of the United States will be smaller than the State levy, as it now is, when state, county and city consumption of gasoline is totaled, it will probably largely exceed the amount bought in the State by the United States. Looking at the question from an economic and not strictly legal point of view, if the United States and the state governments each levy taxes with respect to the gasoline sold to the other, is it not, we respectfully inquire, insofar as taxes of this nature are concerned, merely a matter of swapping dollars?

It is readily apparent that the Texas Company will not benefit by any "windfall" regardless of the outcome of this case. If compelled to pay the taxes, interest and penalties on account of the past transactions, this will be an actual out-of-pocket loss, as the Company did not include the taxes in fixing the price of the gasoline sold to the United States.

It is respectfully submitted that the decree of the District Court was correct and should be affirmed by this Honorable Court.

Respectfully submitted,

JOHN S. COLEMAN,

Attorney for the Texas Company, Appellee;

BRADLEY, BALDWIN, ALL & WHITE,

A. J. BOWRON, JR.,

Of Counsel.

EXHIBIT A.

Copy.

AN ACT

Imposing an Excise Tax on Persons, Corporations, Co-Partnerships, Companies, Agencies or Associations Engaged in the Business of Selling or Distributing Gasoline or Other Liquid Motor Fuels in This State—providing for the Collection and Payment of Such Tax and the Distribution of the Funds Derived Therefrom and Fixing the Penalties for the Violation of any of the Provisions of This Act.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA, That:

SECTION 1. As used in this Act the term "gasoline" shall include gasoline, naptha and other liquid motor fuels commonly used in internal combustion engines, provided that nothing contained in this Act shall apply to those products commercially known as "kerosene oil", "distillates," "gas oil," "fuel oil" or "crude oil". The word "person" means and includes every person, corporation, co-partnership, company, agency or association. The term "distributor" shall include any person who shall engage in the selling of gasoline as herein defined in this State by wholesale in domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term "retail dealer" shall include any person herein defined as "distributor" who is also engaged in the sale of gasoline as herein defined, at any place in this State, in broken quantities.

SECTION 2. Every "distributor" and "retail dealer" in gasoline shall pay an excise tax of two cents (2¢) per gallon upon the sale of gasoline in this State, provided that in no event shall any gasoline sold in interstate commerce be taxed, and provided further the excise tax of two cents (2¢) per gallon upon the sale of gasoline shall be paid only once.

SECTION 3. On or before the 20th day of each month after this Act shall take effect, every distributor of gasoline and every retail dealer of gasoline shall render to the State Tax Commission on forms prescribed by said Commission a true and correct statement of all gasoline sold by such distributor or retail dealer during the next preceding month liable for the payment of the excise tax herein prescribed, and shall furnish to said Commission such additional information as said Commission may require on blanks to be furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise tax herein laid. The statement herein required to be made by the distributor or retail dealer shall be sworn to before some officer authorized to administer oaths and the making of any false or fraudulent statement shall constitute perjury, upon the conviction of which the person so convicted shall be punished as provided by law for the crime of perjury.

SECTION 4. All distributors and retail dealers shall keep in Alabama at some certain place or office such books, documents or papers as will show clearly the amount of sales of gasoline made in this State covered by this Act.

SECTION 5. Within thirty days after the passage of this Act every distributor and retail dealer engaged in the sale of gasoline shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in the business of distributor or retail dealer of gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose. After this Act becomes effective, no person shall engage in selling as a distributor or retail dealer any gasoline covered by the provisions of this Act in this State until he shall have made such report to the State Tax Commission.

SECTION 6. If any distributor or retail dealer in gasoline in this State covered by the provisions of this Act shall fail to make any report to the State Tax Commission as required herein, he shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not

less than Fifty Dollars ($50.00) nor more than Two Hundred Dollars ($200.00) for each offense.

SECTION 7. It shall be the duty of the State Tax Commission to enforce the provisions of this Act and the said Commission shall have the right itself or by any of its members or agents to examine the books of every such distributor or retail dealer of gasoline covered by this Act.

SECTION 8. The proceeds of the excise tax prescribed in this Act shall be divided between the State and the several Counties thereof as follows: one-half of such proceeds shall be paid into the State Treasury to the credit of the general fund to be used for general State purposes; the other half shall be divided and distributed equally among the sixty-seven Counties of the State. The one-half of such proceeds due the several Counties when collected by the State Tax Commission shall be paid to the State Treasurer, and the State Tax Commission shall also at the same time certify to the State Auditor the amount which is due to each County. The State Auditor shall at the end of each month after the said funds are so certified to him draw his warrant upon the State Treasurer payable to the County Treasurer or the County Depositary of each of the several Counties for the several amounts so due each county; and each of the County Treasurers or County Depositaries of the several Counties so receiving such warrants shall place such warrants or the proceeds thereof to the credit of the road and bridge fund of the particular county. And such fund so placed to the credit of the road and bridge fund in each County shall be used for the construction and maintenance of the public highways and bridges in such Counties and for no other purpose.

SECTION 9. The acceptance of any amount paid for the excise tax provided for in this Act shall not preclude the collection of the amount actually due. However, the amount actually paid shall constitute a credit against the amount actually due.

SECTION 10. The forms of all statements and reports required herein shall be prescribed and furnished by the

State Tax Commission. All costs of the enforcement of this Act shall be paid out of the State's share of the funds derived from the excise tax herein prescribed, upon the warrant of the State Auditor drawn upon the voucher of the Chairman of the State Tax Commission and approved by the Governor.

SECTION 11. If any distributor or retail dealer of gasoline covered by this Act fail to make the prescribed monthly return, the State Tax Commission shall make a return for such delinquent upon such information as may be reasonably obtained, assess the tax thereon, and add a penalty of 25% of the tax to the amount as assessed. The State Tax Commission shall as soon as practicable and before the thirtieth day of each month certify to the State Treasurer the names of all persons liable to pay the tax herein provided, together with the post office address and the amount of the tax and if any such taxes shall not have been paid, the Chairman of the State Tax Commission shall issue executions for the collection of such taxes directed to any Sheriff of the State, who shall proceed to collect the same in the manner now prescribed by law for the collection of delinquent taxes by County Tax Collectors and make return of such executions to the State Tax Commission. The taxes and all penalties herein provided for shall be held as a debt payable to the State by the person against whom the same shall be charged, and all such taxes, penalties and assessments shall be a lien upon all property in this State of the party charged therewith.

SECTION 12. Any distributor or retail dealer who shall violate any of the provisions of this Act may be restrained by proper proceedings instituted in the name of the State of Alabama by the Attorney General or any Circuit Solicitor from either distributing or selling gasoline, the sale of which is taxable in this State, until such person shall have complied with the provisions of this Act.

SECTION 13. All other State excise and inspection taxes on the sale of gasoline imposed before the passage of this Act shall be and the same are hereby repealed, and all State

laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

SECTION 14. Should any Section or any part of this Act be declared unconstitutional it shall not invalidate the remainder thereof.

SECTION 15. This Act shall take effect on the first day of the month next succeeding its passage.

Approved Feb. 10, 1923.

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA.

At Law.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *a Corporation,*

v.

HENRY S. LONG, *as Chairman of the State Tax Commission of Alabama, and Individually,* JOHN P. KOHN, *as Associate Member of the State Tax Commission of Alabama, and Individually,* W. W. RAMSEY, *as Associate Member of the State Tax Commission of Alabama, and Individually, and* JOHN BRANDON, *as State Treasurer of Alabama, and Individually.*

Come the defendants, Henry S. Long, John P. Kohn, W. W. Ramsey and John Brandon as individuals, and, appearing specially for the sole purpose of objecting to the jurisdiction of the Court to hear and determine the above captioned cause, they separately and severally suggest the lack of jurisdiction of this Honorable Court to hear and determine the same, and they plead to the jurisdiction of

this Honorable Court, as aforesaid, and as grounds therefor, they assign the following:

1. That this suit is in fact and in truth a suit against the State of Alabama, albeit these defendants in their respective individual capacities are the nominal parties defendant thereto.

That the defendants, as individuals, have no personal or private interest in the subject of said suit; that under the provisions of Section 379 of the Alabama Revenue Act of 1935, if and when suit is brought against officers "for the recovery of the amount of the tax paid which it is claimed is excessive or invalid, and a court of competent jurisdiction determines what amount of such tax so paid is excessive or invalid, said court shall order the same repaid by the State of Alabama, or its agencies". So that, in this suit, although these defendants, as individuals, are made parties defendant, the real party in interest is the State of Alabama.

That the said suit is instituted under the purported authority of Section 379 of the Alabama Revenue Act of 1935, and defendants aver that said Section 379, and the statutory proceedings to which it refers, purported to give the consent of the State to be sued only in its own courts. That the immunity of the State of Alabama from being impleaded in a court of the United States, accorded to it by the Eleventh Amendment to the Constitution of the United States has not been waived by the enactment of the said statute, or by the enactment of any statute by the Legislature of Alabama.

Wherefore, defendants aver that this Honorable Court has no jurisdiction to hear and determine said cause.

2. That this suit is in fact and in truth a suit against the State of Alabama, albeit these defendants in their respective individual capacities are the nominal parties defendant thereto.

That the defendants, as individuals, have no personal or private interest in the subject of said suit; that under the provisions of Section 379 of the Alabama Revenue Act of 1935, if and when suit is brought against officers "for the

recovery of the amount of the tax paid, which it is claimed is excessive or invalid, and a court of competent jurisdiction determines what amount of such tax so paid is excessive or invalid, said court shall order the same repaid by the State of Alabama, or its agencies". So that, in this suit, although these defendants, as individuals, are made parties defendant, the real party in interest is the State of Alabama.

That the State of Alabama is immune from being impleaded in a court of the United States, under the provisions of the Eleventh Amendment to the Constitution of the United States. That no effective waiver of such immunity has been made or done by the State of Alabama.

Wherefore, the defendants aver that this Honorable Court has no jurisdiction to hear and determine the said cause.

EXHIBIT C.

Arizona.

Laws First Special Session 1931-32, Chap. 16, as amended by Session Laws 1933, Chap. 27.

TAX: A "license" tax is imposed upon every distributor as defined in the act, of five cents "for each gallon of motor vehicle fuel possessed, refined, manufactured, produced, blended or compounded in this State * * * or imported." (Sec. 1673.)

EXEMPTIONS: Motor vehicle fuel "in interstate or foreign commerce * * * or motor vehicle fuel sold to the United States or any department thereof" is specifically exempted from the payment of the "license taxes" levied by the act. (Sec. 1677a.)

REFUNDS: Any consumer or other person buying motor fuel within the State and using same for purposes other than propelling motor vehicles upon the highways of the State may file a claim for refund equivalent to the amount

of the tax levied upon the number of gallons purchased, at any time within six months from the date of purchase. Persons filing a claim for such refunds must prove the purchase within the State of the number of gallons upon which refund is claimed. It is provided that original invoices of sale shall constitute prima facie proof of claim. (Secs. 1677 b-c.)

Arkansas

Act 65, Acts 1929, as amended by Act 63, Acts 1931, as amended by Acts 5 and 11, Acts 1934, as amended by Acts 147 and 190, Acts 1935.

PURPOSE: It is the expressed purpose of this act to provide for the collection "at the source within this State of a tax on the sale or use of motor vehicle fuel * * * double taxation is not intended." The tax levied is to be collected from the manufacturer or wholesaler. It is stated that the further purpose of the act is "to provide for the repayment to the consumer of all tax on motor vehicle fuel not used in propelling motor vehicles on the public highways and roads" of Arkansas. (Secs. 37, 39, 49.)

TAX: The act provides for the levying of "a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel * * * sold or used in this State." (Sec. 23c.) The tax is payable monthly and is deemed to accrue when the manufacturer delivers the motor vehicle fuel to a carrier for transportation to a jobber, wholesaler, consumer or other person, or upon the delivery of motor vehicle fuel to a wholesaler receiving it before any tax has been paid upon same. (Sec. 40.)

EXEMPTION: Motor vehicles belonging to the United States are not required to pay any motor vehicle fuel tax and "where motor vehicle fuel upon which the tax has been paid is sold to any agent or employee of the United States Government for use in a motor vehicle belonging to the United States Government * * * the wholesaler or dealer may not charge the consumer with the amount of the tax but may claim the refund of same" as otherwise prescribed. (Sec. 35.)

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California.

Stats. 1923, p. 571 as amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, pp. 1249, 1631; Stats. 1935, Chap. 558, 500, 607, 624.

TAX: The act imposes a "license tax" of three cents per gallon on gasoline "distributed." (Gasoline sold, donated, consigned for sale, stolen, bartered or used, is said to be distributed.) (Secs. 3, 7.)

EXEMPTION: Motor vehicle fuel "sold to the Government of the United States or any department thereof" is exempt from the tax and if the tax has been directly or indirectly paid, a refund may be claimed as provided for under refunds. (Sec. 10.)

REFUND: Any consumer or other person buying or using motor vehicle fuel for purposes other than propelling motor vehicles upon the public highway and "who shall have paid any license tax for any such motor vehicle fuel hereby required to be paid either directly, or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel" shall be entitled to a refund. (Sec. 11.)

Colorado.

Session Laws 1933, Chap. 140, as amended by House Bill 288 of Thirtieth General Assembly, approved April 10, 1935.

TAX: A tax of four cents per gallon is imposed on the sale or use, measured by the total amount of motor fuel received by each distributor. (Sec. 2.)

EXEMPTION: Sales to the United States or any of its agencies specifically exempted. (Sec. 2.)

REFUNDS: Any consumer using motor fuel for purposes other than propelling motor vehicles upon State highways is entitled to a refund. Provisions substantially similar to California act. (Sec. 3.)

Delaware.

Session Laws 1935, p. 295.

TAX: A tax of four cents per gallon is imposed on gasoline "sold and delivered or used." (Sec. 6.)

EXEMPTION: Allowed to the United States and its governmental agencies. (Sec. 6e.)

REFUND: The tax is collected from wholesalers and distributors and a refund is provided for those using motor fuel for purposes other than propelling vehicles upon the State highways. (Sec. 16.)

District of Columbia.

Public No. 104—Sixty-Eighth Congress (H. R. 655).

TAX: A tax of two cents per gallon is imposed upon all motor vehicle fuels "sold or otherwise disposed of by an importer (as defined) or used by him in a motor vehicle." (Sec. 1.)

REFUNDS: Any person purchasing or using motor vehicle fuels for purposes other than propelling vehicles upon the public highways of the District of Columbia may apply for a refund. (Sec. 10.)

Florida.

Acts 1929, Chap. 13756 and Acts 1931, Chap. 15659, and House Bill 427, approved May 28, 1935.

TAX: A tax of seven cents per gallon is imposed upon the sale of motor vehicle fuel. (Sec. 1.) A complementary statute imposes a like tax of seven cents per gallon upon the storage of gasoline for use or consumption after the same shall have been stored within the State for a period of 24 hours. (Sec. 1.)

There are no specific provisions covering exemptions or refunds.

Georgia.

Laws 1927, Act 378 as amended by Laws 1929, Act 284.

TAX: Distributors must pay "an occupation tax of six cents per gallon" on motor fuels sold or used within the State. (Distributors are defined as including those who import motor vehicle fuels to the State for use, and keep same in storage for a period of 24 hours.) (Secs. 2, 1.)

No specific provisions covering exemptions or refunds.

Idaho.

Laws 1933, Chap. 46.

TAX: A tax of five cents per gallon is imposed upon motor fuels "sold, distributed and/or used." This tax is collected from motor fuel dealers and retailers. (Sec. 10.)

REFUND: The act contains provisions substantially similar to the California act, permitting refunds to consumers using motor fuel for purposes other than propelling motor vehicles over or on State highways. (Sec. 18.)

Illinois.

Senate Bill No. 85, approved March 25, 1929, with amendments effective January 1, 1934.

TAX: It is provided that every "distributor (as defined) * * * shall collect from the purchaser at the time of * * * sale three cents per gallon on all motor fuel sold * * * and shall also pay * * * three cents per gallon on all motor fuel used by him." (Sec. 6.)

EXEMPTION: Allowed as required by "the Constitution and statutes of the United States." (Sec. 6.)

REFUND: In the section imposing the tax, it is provided that "in each subsequent sale of motor fuel on which the three cents per gallon has been collected as herein provided, the amount so collected shall be added to the selling price, so that said amount is paid ultimately by the user of said

motor fuel." (Sec. 6.) However, "any person" who uses motor vehicle fuel for purposes other than operating a motor vehicle upon the public highways may claim a refund. (Sec. 13.)

Indiana.

Act No. 256, House, approved March 8, 1933, as amended by Act No. 91, H. approved March 5, 1935, and Act No. 54 H. approved March 11, 1935.

TAX: A tax of four cents per gallon is imposed upon selling, distributing or using motor vehicle fuel upon the public highways.

REFUND: Allowed to anyone on motor vehicle fuel used for purposes other than propulsion of motor vehicles upon State highways. (Sec. 1.)

Iowa.

"Iowa motor vehicle fuel tax laws"—enacted by Forty-Fifth Assembly, Extra Session 1934.

TAX: A "license fee of three cents per gallon * * * is imposed on the sale or use of all motor vehicle fuel sold or used." (Sec. 3.)

EXEMPTION: Allowed to the United States of America or any of its instrumentalities or agencies (Sec. 3.)

REFUND: Provision for passing on the tax to the consumer and allowing refunds to those using motor vehicle fuel for purposes other than the propulsion of motor vehicles on state highways, is similar to provisions of Illinois act. (Secs. 4, 29.)

Kansas.

1935, Chap. 311.

TAX: The act imposes a tax of three cents per gallon upon the "use, sale or delivery of all motor vehicle fuels used, sold or delivered." (Sec. 8.)

EXEMPTION: Allowed to the United States and its agencies (Sec. 8.)

REFUNDS: This act with respect to the features under consideration contains refund provisions substantially similar to the Illinois act. (Secs. 9, 10, 17, 18.)

Kentucky.

"Gasoline and fuel tax law", Acts General Assembly, 1932 Session (K. S. 4224B-1-11).

TAX: The act imposes a tax of five cents per gallon on all gasoline sold "at wholesale" (as defined). (Sec. 1.)

There are no provisions relative to exemptions or refunds.

Louisiana.

Act No. 6, Special Session 1928, as amended by Act No. 8, 1930, as amended by Act No. 16, 1932, as amended by Act No. 34, 1934; Act. No. 1, Extra Session, 1930.

TAX: A tax of four cents per gallon is imposed upon all gasoline or motor fuel "sold, used or consumed in the State of Louisiana." (Sec. 1.)

EXEMPTION: Allowed to "the Unted States Government or any agency or department thereof." (Sec. 14.)

Maine.

Sec. 80, Chap. 12 R. S. 1930, as amended by Chap. 190 P. L. 1931, and Chap. 283 P. L. Special Session 1932.

This act with respect to the features under consideration is substantially similar to the Colorado act, supra, with the exception that those persons using motor fuel for purposes other than the propulsion of motor vehicles over state highways may claim a refund to the extent of only three-fourths of the tax levied by the act. (Secs. 80, 83, 84, 89.)

Maryland.

Annotated Code Md., Art. 56.

This act imposes a tax of four cents per gallon upon motor fuel and with respect to the features under consideration, is substantially similar to the California and Colorado acts. (See Secs. 211, 212, 219, 219a.)

Massachusetts.

Acts 1932, Chap. 248; Acts 1935, Chap. 336.

TAX: An excise tax of three cents per gallon is imposed upon each gallon of motor vehicle fuel sold. (*Sale* is defined as including use.)

REFUND: A refund provision substantially similar to that contained in the Illinois act is provided. (Secs. 7, 9.)

Michigan.

Acts 1927, Act No. 150 as amended by Acts 1931, Act No. 160, and Acts 1935, No. 166.

PURPOSE: "It is the intent of this act to impose a tax upon the owners and drivers of motor vehicles * * * for the privilege" of driving upon the public roads. (Sec. 2.)

TAX: The tax imposed by this act and the exemption and refund provisions are substantially similar to the California act, *supra.*

Minnesota.

Laws 1925, Chap. 297 as amended by Laws 1927, Chap. 434; laws 1933, Chap. 417.

TAX; The act imposes "an excise tax of three cents per gallon on all gasoline used * * * in propelling motor vehicles" over the public higways. (Sec. 2720-71.)

The exemption and refund provisions of this act are substantially similar to those of the California act, *supra.*

Mississippi.

Art. 2, Chap. 116, Code of 1930, as amended by Chap. 21, extraordinary session of 1931, as amended by Chap. 93, H. B. 688, Laws 1932.

TAX: It is provided that all distributors or wholesale dealers of gasoline shall pay for the privilege of engaging in such business an excise tax of six cents per gallon on gasoline sold, used, or stored and/or distributed. (Sec. 4789.)

EXEMPTION: Allowed to the United States and its instrumentalities. (Sec. 4790.)

REFUND: It is provided that all gasoline imported will be deemed to have been brought into the state for use in propelling motor vehicles over state roads, and the tax is payable monthly upon such gasoline as shall have been brought into the state. However, anyone using gasoline for purposes other than the propulsion of motor vehicles over state roads may claim a refund. (Sec. 4785; Sec. 23 of H. B. 688, 1932.)

Missouri.

Laws 1925, p. 255.

TAX: An "excise tax" of two cents per gallon is imposed upon the sale or use of motor vehicle fuels within the state. (Secs. 7794, 7814.)

The collection of the tax and the refund provisions are substantially similar to those of the Mississippi act, *supra.*

Montana.

Acts of Montana, as re-enacted in referendum measure 1935, effective by proclamation of governor, May 19, 1931, as amended by Chap. 170, Laws 1933, and Chap. 116, Session Laws 1935.

TAX: A license tax upon distributors and dealers in gasoline, amounting to five cents on every gallon sold or distributed is imposed by this act. (Secs. 2382, 2383.)

REFUND: A refund provision substantially similar to that of the California act, *supra,* is provided.

Nebraska.

Laws 1933, p. 433; Laws 1935, Senate File 363.

TAX: The act imposes "an excise tax of four cents per gallon upon the use of all motor vehicle fuel within the state."

REFUND: It is provided that the dealer shall not only be entitled to deduct the customary percentage to cover shrinkage, but shall also be permitted to retain 1% of the tax collected as a "commission." Provisions are made for the refund of tax to the United States Government or its agencies and, in the event of loss to dealers.

Nevada.

Laws 1935, Chap. 74.

TAX: The tax imposes "an excise tax of four cents per gallon on all motor vehicle fuel * * * sold, distributed or used," but the dealer may deduct 2% thereof to cover costs of collection and losses occasioned by evaporation, spillage or other valid causes. (Sec. 2.)

EXEMPTION: Gasoline sold to the United States is exempt from tax and the seller may apply for a refund. (Sec. 5.)

REFUND: Any person "who shall buy and use any such fuel for purposes other than in or for the propulsion of motor vehicles and who shall have paid any tax on such fuel * * * either directly by the collection of such tax by the vendor from such consumer or indirectly by the adding of such tax to the price of such fuel, shall be reimbursed and repaid" the amount so paid by him or it. (Sec. 5.)

New Hampshire.

Public Laws 1931, Chap. 104.

TAX: The act provides that distributors shall pay a "road toll" of four cents per gallon upon gasoline distributed,

"the same being collected by the distributor from the dealer and by the dealer from the consumer." (Sec. 4.)

The act with respect to the features under consideration is substantially similar to the California act, *supra*, except that no express exemption to the United States is provided.

New Jersey.

Laws 1935, Chap. 319.

This act with respect to the features under consideration is substantially similar to the Nevada act.

New Mexico.

Laws 1933, Chap. 176; Laws 1934, Chap. 25; Laws 1935, Chap. 146.

This act is substantially similar to the Colorado act, *supra*, except that separate acts provide for a refund to every person using gasoline for purposes other than the operation of a motor vehicle upon the public highways of the state. (Laws 1931, Chap. 31; Laws 1933, Chap. 162; Laws 1935, Chap. 101.)

New York.

T. L. Sec. 283—284a-b.

With respect to the features under consideration, this act is substantially similar to the Colorado act, *supra*.

North Carolina.

P. L. 1931, Chap. 145, Sec. 24 as amended by P. L. 1931, H. B. 1242; P. L. 1933, Chaps. 137 and 211.

This act, with respect to the features under consideration, is substantially similar to the Nevada act, *supra*.

North Dakota.

"Motor vehicle fuel tax law" effective July 1, 1935; Acts 1935.

With respect to the features under consideration, this act is substantially similar to the Nevada act, *supra*, though no express exemption to the United States is provided.

Ohio.

General Code, Secs. 5526-41-12 as amended by H. B. 341, 1935.

With respect to the features under consideration, this act is substantially similar to the Nevada act, *supra*.

Oklahoma.

Oklahoma Stats. 1931, Secs. 12527-12579 as amended by Act approved April 5, 1933.

TAX: This act imposes an "excise tax of four cents per gallon upon the sale of each and every gallon of gasoline sold or stored and distributed, or withdrawn from storage within this state for sale or other use." (Sec. 12527 as amended.)

EXEMPTIONS: An exemption is allowed for all gasoline or motor fuel used for agricultural purposes. There is no express exemption to the United States. (Sec. 12576.)

REFUNDS: The act provides that any person who "purchases motor fuel within this state, on which, by reason of his non-liability for the excise tax a refund may be due", shall obtain such refund by filing claim therefor within the month next succeeding its use. (Sec. 12577.) It is further provided that a refund may be obtained when a distributor or retailer sells motor fuel to a purchaser under circumstances which preclude the collection of the excise tax levied by the state "because of any provision of the Constitution of the United States or any law thereof enacted pursuant to the Constitution." (Sec. 12575.)

Oregon.

1933 Acts. Chap. 428 as amended by Acts 1935, Chap. 403; act is substantially similar to the Nevada act with respect to the features herein considered.

Pennsylvania.

Laws General Assembly 1931, Act 105 as amended by Laws 1935, Act 181.

TAX: A state tax of three cents per gallon is imposed on all liquid fuels "used or sold and delivered by distributors within this commonwealth excepting liquid fuels delivered to the United States Government on presentation of a duly authorized United States Government exemption certificate or other evidence satisfactory to the department" and such liquid fuels used or sold and delivered as are not within the taxing power of the commonwealth under the commerce clause of the Federal Constitution. (Sec. 4.)

REFUNDS: It is provided that refunds may be made to distributors or retailers selling tax exempt fuel to the United States upon which the tax has been paid. (Sec. 17.)

Rhode Island.

Laws 1925, Chap. 679 as amended by Laws 1927, Chap. 1033, and Laws 1929, Chap. 1405 and Laws 1930, Chap. 1564.

This act with respect to the features considered, is substantially similar to the Nevada act.

South Carolina.

Civil Code of South Carolina, 1932, Title 25, Chap. 107, Art. 3, Secs. 2505-2520 and 2528, as amended by Laws 1932, Act. 804.

TAX: A privilege tax of six cents per gallon is imposed upon every person (as defined) engaging in "the business of selling, consigning, using, shipping or distributing for the purpose of sale" any gasoline within the state. (Sec. 2505.) A complementary tax is imposed on every person (as defined) importing gasoline into the state for use after such gasoline shall have been stored within the state for a period of 24 hours. (Sec. 2512.)

EXEMPTION: Allowed on gasoline sold to the United States. (Sec. 2528.)

South Dakota.

"South Dakota motor fuel tax law," approved August 8, 1933.

The tax imposed by this act is substantially similar to that imposed by the Nevada act, with respect to the features under consideration, except that no express exemption is granted to the United States.

Tennessee.

Code Tennessee, 1932, as amended by Acts 1933, Chap. 130.

TAX: The statute imposes a privilege tax upon distributors and dealers (as defined) of six cents per gallon for each gallon of distillate "refined, manufactured, produced or compounded by such (distributor or dealer) and sold, stored or distributed by him in this state or shipped, transported or imported by such (distributor or dealer) into and distributed, stored or sold by him within this state during such year." (Secs. 1127-28.)

EXEMPTIONS: It is expressly provided that motor fuel "not previously the subject of an original sale in this state, stored in this state for export to points outside the state, shall not be included in the measure of the tax liability of any distributor or dealer."

There are no specific provisions with respect to exemptions to the United States or refunds to certain classes of users.

Texas.

H. B. 247, Chap. 44, General Laws of regular session of Forty-Third Legislature, as amended by regular session of Forty-Fourth Legislature, effective May 11, 1935.

TAX: "An occupation or excise tax of four cents" per gallon is imposed on "the first sale" of gasoline in Texas "it being intended to impose the tax at its source in Texas or as soon thereafter as said motor fuel may be subject to pay tax." (Sec. 2.)

REFUNDS: Allowed to any person using gasoline for purposes other than propelling motor vehicles upon state highways (Sec. 13a) and also to everyone exempt from the tax under the Constitution of the State of Texas and of the United States. (Sec. 2c.)

Utah.

Revised statutes 1933, Chap. 12.

TAX: An excise tax of four cents per gallon is imposed upon "the sale or use of all motor fuels sold or used" within the state. (Sec. 57-12-5.)

The act contains no specific provisions concerning exemptions to the United States, or refunds.

Vermont.

Public Laws, Chap. 52.

TAX: A tax of four cents per gallon is levied upon every distributor (defined as one importing motor fuel for use, distribution or sale, or producing or refining same) of gasoline sold or used within the state. (Sec. 1228.)

There are no provisions specifically exempting the United States or providing for any deductions under this act.

Virginia.

Acts 1932, Chap. 212 as amended by Acts 1933, Special Session, Chap. 57, and Acts 1934, Chap. 65.

TAX: The tax imposed by this act is substantially similar to the Nevada act, *supra,* with respect to the features under consideration.

Washington.

Laws 1933, Chap. 58 as amended by Laws 1935, Chap. 109.

The tax imposed by this act is substantially similar to the Nevada act, *supra,* with respect to the features herein considered.

West Virginia.

1931 Official Code of West Virginia, Chap. 11, Art. 14.

TAX: The act imposes an excise tax of four cents per gallon on gasoline and is substantially similar to the Nevada act, *supra,* with the exception that no specific exemption regarding sales of gasoline to the United States is provided.

Wisconsin.

Laws 1933, Chap. 78.

The act with respect to the features under consideration is substantially similar to the Nevada act, *supra.*

Wyoming.

Chap. 115, Art. 11, Wyoming Revised Statutes, 1931, as amended by Chap. 60, Session Laws Wyoming, 1933 Special Session.

TAX: A license tax of four cents per gallon is "levied on all gasoline produced, refined, manufactured, blended or compounded and used within this state and on all gasoline produced, refined, manufactured, blended and compounded and sold or distributed for sale or use within this state, or imported into this state for sale or use therein." (Sec. 115-1102.)

EXEMPTION: There is no provision in the act expressly exempting sales of gasoline to the United States.

REFUND: It is provided that any purchaser or user of gasoline for purposes of operating air crafts may obtain a refund of two cents per gallon upon every gallon of gasoline in excess of ten thousand gallons used per month. (Sec. 115-1103.)

EXHIBIT D.

"*Written opinion of attorney-general protects officer.*—The written opinion of the attorney-general secured by either a state or a county officer legally entitled to secure opinion, shall protect such officer to whom it is directed from liability to either the state, county or other municipal sub-division of the state, because of any official act or acts performed as directed or advised in such opinion." (Section 869, Code of Alabama of 1923.)